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APPENDIX

UNREPORTED CASES AND NON-ILLINOIS STATE CASES

LEXSEE

A.I. CREDIT CONSUMER DISCOUNT CO., Plaintiff, v. PREMIERE FOODS, INC., FIFTH AVENUE ICE CREAM OF NEVADA, INC., FIFTH AVENUE ICE CREAM, INC., FIFTH AVENUE ICE CREAM OF NEW JERSEY, INC., CONEY ISLAND HOT DOGS OF NEVADA, INC., CONEY ISLAND HOT DOGS, INC., CONEY ISLAND HOT DOGS OF NEW JERSEY, INC., PREMIERE PRETZELS OF NEVADA, INC., and FRANK R. BONANNO, Defendants.

Civ. No. 04-4049 (WHW)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2007 U.S. Dist. LEXIS 81737

November 5, 2007, Decided
November 5, 2007, Filed

NOTICE: NOT FOR PUBLICATION

COUNSEL: [*1] Kathleen Cavanaugh, Jerome F. Gallagher, Jr., Norris McLaughlin & Marcus, P.A., Somerville, NJ, Attorneys for Plaintiff.

Karen A. Ermel, Karen A. Ermel, L.L.C., Mendham, NJ, Attorney for Defendants.

JUDGES: William H. Walls, United States Senior District Judge.

OPINION BY: William H. Walls

OPINION

Walls, Senior District Judge

Pursuant to Federal Rule of Civil Procedure 56, Defendant Premiere Foods, Inc. ("Premiere Foods"), Defendants Fifth Avenue Ice Cream of Nevada, Inc., Fifth Avenue Ice Cream, Inc., Fifth Avenue Ice Cream of New Jersey, Inc., Coney Island Hot Dogs of Nevada, Inc., Coney Island Hot Dogs, Inc., Coney Island Hot Dogs of New Jersey, Inc., and Premiere Pretzels of Nevada, Inc. (collectively, the "Affiliate Defendants"), and Defendant Frank R. Bonanno move for summary judgment on all counts of the Complaint of Plaintiff A.I. Credit Consumer Discount Co. ("A.I. Credit"). The motion for summary judgment is granted.

FACTS AND PROCEDURAL BACKGROUND

This action arises as a result of Plaintiff A.I. Credit's inability to satisfy a judgment against Premiere Foods, LLC (the "LLC") and Defendant Premiere Foods in the action titled A.I. Credit Consumer Discount Co. v. Premiere Foods, LLC, et al., Civ. Action No. [*2] 02-2515 (the "First Action"). In the First Action, District Judge Dennis Cavanaugh granted summary judgment in favor of Plaintiff on October 15, 2003, and judgment was entered on January 14, 2004. Once Plaintiff determined that the LLC and Premiere Foods would be unable to satisfy its judgment in the First Action, Plaintiff initiated this action, A.I. Credit Consumer Discount Co. v. Premiere Foods, Inc., et al., Civ. Action No. 04-4049 (the "Second Action"), on August 20, 2004. In the Second Action, Plaintiff brings claims for (1) piercing the corporate veil, (2) common law fraud, creditor fraud, or fraudulent transfer, [1] and (3) unjust enrichment. On March 23, 2007, Defendants moved for summary judgment, arguing: (1) that Plaintiff is unable to prove every essential element of its various claims; (2) that the unjust enrichment claim is time-barred or, in the alternative, that an unjust enrichment claim is inappropriate when a contract exists defining the scope of the parties' relationship; (3) that res judicata precludes further judgment against Premiere Foods; and (4) that Plaintiff's prayer for attorneys fees is inappropriate. In addition to its opposition brief, Plaintiff filed [*3] the declaration and expert report of William P. Breen. The Court heard oral argument on the motion on October 24, 2007.

1 As discussed further below, although Plaintiff's opposition brief to Defendants' motion for summary judgment strongly suggests it is only bringing a claim for fraudulent transfer, its Complaint is devoid of allegations indicating such a claim. In addition, it is unclear whether Plaintiff expressly disclaims any common law fraud or creditor fraud claims. As a result, the Court, for completeness, has analyzed the merits

of Plaintiff's claim under each of these fraud-based theories.

1. The First Action

Plaintiff filed the First Action on May 24, 2002, as a result of the LLC's default on a loan of $ 1,037,389.00. Following the execution of promissory notes and guarantee agreements by the LLC and Premiere Foods, respectively, Plaintiff had forwarded funds to the LLC in two installments -- (1) $ 225,000.00 on June 11, 1996; and (2) $ 812,389.00 on July 31, 1996. This loan was intended to finance the purchase of six life insurance policies, which insured the lives of Defendant Bonanno and Frank Bonomo, who, at that time, were the shareholders of Premiere Foods and the Affiliate [*4] Defendants. In addition to the guarantee provided by Premiere Foods, further protection was provided for Plaintiff through an agreement to assign the life insurance policies to serve as collateral securing the loan.

The funds that Plaintiff loaned to the LLC, however, were largely used for purposes other than financing the six life insurance policies. Between April 1997 and June 2001, only $ 640,054.00 was disbursed from the LLC in payment of the premiums of the six life insurance policies. As a result, the six life insurance policies provided Plaintiff with no protection in the event of the LLC's default.

On May 1, 2001, the LLC first defaulted on its obligations. The LLC did make payment on its obligations for the month of June, but failed to make any further payments due after that date. Plaintiff declared an Event of Default on February 28, 2002. Plaintiff filed its Complaint in the First Action on May 24, 2002, and moved for summary judgment on May 15, 2003, which was granted by Judge Cavanaugh on October 15, 2003. Judgment was entered on January 14, 2004, in favor of Plaintiff and against the LLC and Premiere Foods, jointly and severally, in the amount of $ 1,231,418.91.

2. The [*5] Second Action

Plaintiff initiated the Second Action on August 20, 2004, following its inability to satisfy its judgment in the First Action. Because the LLC had been formed solely to serve as the borrower in the lending transaction at issue in the First Action, it had no additional funds that could be used for satisfaction. Furthermore, in or around May 2003, Premiere Foods, the guarantor on the loan, ceased active business operations. Plaintiff alleges that Premiere Foods's wind-up was a ploy intended to judgment-proof the corporation before a likely adverse judgment on Plaintiff's motion for summary judgment in the First Action. In addition to its other two claims, Plaintiff is now seeking to pierce Premiere Foods's corporate veil to obtain satisfaction of the First Action from Premiere Foods's sole shareholder -- Bonanno [2] -- and a number of corporations with which, under a common organizational structure, Premiere Foods was affiliated and for which Premiere Foods provided management services -- the Affiliate Defendants. [3] Plaintiff alleges that Bonanno utilized the corporate form to benefit his own interests, including the repayment of personal debts and substantial compensation [*6] in the form of "salary." Additionally, Plaintiff asserts that Premiere Foods's relationship with the Affiliate Defendants was such that no corporate formalities were observed and that there was a lack of financial separation among the organizations.

2 Bonanno and Frank Bonomo had each held fifty-percent interests in Premiere Foods and the Affiliate Defendants, but on March 15, 2002, Bonanno bought out Bonomo's interests.

3 The Affiliate Defendants consist of seven corporations, solely owned by Bonanno. Each Affiliate Defendant is either (1) the owner of fast food restaurants, or (2) a lease-holding company.

A. Premiere Foods's Relationship to the Affiliate Defendants Before Its Wind-Up

Before its wind-up, Premiere Foods had performed management services, including accounting and administrative services, for the Affiliate Defendants. As part of its management services, Premiere Foods reconciled the bank accounts of the individual fast food restaurants owned by the Affiliate Defendants. In addition, the day-to-day income of the individual fast food restaurants was typically automatically transferred from their bank accounts to Premiere Foods's bank account, and the funds were used to pay liabilities [*7] of the fast food restaurants and to fund the Affiliate Defendants' payroll accounts. Premiere Foods maintained records as to the source of each deposit into its account, as well as the purpose of each disbursement from its account. Although there were no written management agreements between Premiere Foods and the Affiliate Defendants, Premiere Foods charged management fees for the services it provided.

According to Plaintiff, however, Premiere Foods and the Affiliate Defendants acted as an integrated enterprise, with no observation of corporate formalities and no financial separation. Plaintiff cites testimony from Premiere Foods's Chief Financial Officer Michael Hunt, noting that there was an absence of director or officer meeting notes or records for each, individual Affiliate Defendant. Further, Hunt states that despite the existence in Premiere Foods's office of corporate books for each of the Affiliate Defendants, the books contained mostly empty pages and some boilerplate information. Plaintiff asserts that Premiere Foods and the Affiliate Defendants treated income and expenses incurred by individual entities as income and expenses of the organization as a whole. According to [*8] Plaintiff, in providing its management services, Premiere Foods often used funds generated by profitable entities to cover losses generated by other entities, but such intra-organizational loans were never reconciled. Plaintiff also alleges that the payment of management fees to Premiere Foods was determined arbitrarily and that the financial statement and tax reporting of the fees would be adjusted among the Affiliate Defendants in whatever manner was deemed in Bonanno and Bonomo's best interests.

B. Changes to Defendants' Organizational Structure After Premiere Foods's Wind-Up

Following Premiere Foods's wind-up in May 2003, Plaintiff alleges that one of the Affiliate Defendants, Fifth Avenue Ice Cream of Nevada, Inc. ("Fifth of Nevada"), assumed all of the services previously performed by Premiere Foods. In 2003, a concentration account and a payroll account were established using the name and taxpayer identification number of Fifth of Nevada, and each of the Affiliate Defendants established its own operating bank account. Beginning in 2003, at the end of each day, the balance of an individual fast food restaurant's bank account is automatically transferred into the operating bank [*9] account of the Affiliate Defendant that holds an interest in that restaurant. Following the payment of expenses incurred by the Affiliate Defendant, any money remaining in the operating bank account of the Affiliate Defendant is automatically transferred to the Fifth of Nevada concentration account. Additionally, when an Affiliate Defendant incurs liabilities that are greater than the amount currently in its operating bank account, funds are automatically transferred from the Fifth of Nevada concentration account to the Affiliate Defendant's operating bank account. Fifth of Nevada maintains all records relating to the individual bank accounts of the fast food restaurants, the operating bank accounts of the Affiliate Defendants, the concentration account, and the payroll account, as well as all records and ledgers for the Affiliate Defendants.

C. The General Electric Loans

On September 24, 2003, General Electric Capital Finance Corp. ("GE") entered into eleven separate loans with the Affiliate Defendants and other related organizations. Premiere Foods was not a guarantor for the loans or a recipient of any of the proceeds. Plaintiff, however, claims that Premiere Foods and the Affiliate [*10] Defendants were acting as one enterprise in the GE loan transactions and that the GE loans were used to satisfy Bonanno's personal debts.

LEGAL STANDARD

Summary judgment is appropriate where the moving party establishes that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute between the parties will not defeat a motion for summary judgment unless it is both genuine and material. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A factual dispute is genuine if a reasonable jury could return a verdict for the non-movant and it is material if, under the substantive law, it would affect the outcome of the suit. See id. at 248. The moving party must show that if the evidentiary material of record was reduced to admissible evidence in court, it would be insufficient to permit the non-moving party to carry its burden of proof. See Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Once the moving party has carried its burden under Rule 56, "its opponent [*11] must do more than simply show that there is some metaphysical doubt as to the material facts in question." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). The opposing party must set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings. Fed. R. Civ. P. 56(e); Shields v. Zuccarini, 254 F.3d 476, 481 (3d Cir. 2001). At the summary judgment stage the court's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for trial. See Anderson, 477 U.S. at 249. In doing so, the court must construe the facts and inferences in the light most favorable to the non-moving party. See id. at 255; Curley v. Klem, 298 F.3d 271, 276-77 (3d Cir. 2002).

DISCUSSION

1. Piercing the Corporate Veil

Under New Jersey law, all actions seeking to pierce the corporate veil must overcome "the fundamental propositions that a corporation is a separate entity from its shareholders . . . and that a primary reason for incorporation is the insulation of shareholders from the liabilities of the corporate enterprise." State, Dep't of Envtl. Prot. v. Ventron Corp., 94 N.J. 473, 500, 468 A.2d 150 (1983) [*12] (citations omitted). Accordingly, piercing the corporate veil is "an equitable remedy to be reserved for 'extraordinary circumstances.'" Mitsui

O.S.K. Lines v. Cont'l Shipping Line Inc., Civ. Action No. 04-2278, 2007 U.S. Dist. LEXIS 48216, 2007 WL 1959250, at *5 (D.N.J. June 29, 2007). "The purpose of the doctrine of piercing the corporate veil is to prevent an independent corporation from being used to defeat the ends of justice, . . . to perpetrate fraud, to accomplish a crime, or otherwise to evade the law." Ventron, 94 N.J. at 500 (citations omitted).

There are two elements for piercing the corporate veil: (1) "[T]he parent so dominated the subsidiary that it had no separate existence but was merely a conduit for the parent;" and (2) "[T]he parent has abused the privilege of incorporation by using the subsidiary to perpetrate a fraud or injustice, or otherwise to circumvent the law." Craig v. Lake Asbestos of Que., Ltd., 843 F.2d 145, 149 (3d Cir. 1988) (applying New Jersey law) (quotation omitted). According to the Third Circuit, a court should consider the following factors when determining whether the first element, dominance, has been met:

> [G]ross undercapitalization[,] failure to observe corporate formalities, [*13] non-payment of dividends, the insolvency of the debtor corporation at the time, siphoning of funds of the corporation by the dominant stockholder, non-functioning of other officers or directors, absence of corporate records, and the fact that the corporation is merely a facade for the operations of the dominant stockholder or stockholders.

Id. at 150 (quotation omitted). As this Court has previously stated, with respect to the second element, "there must be some 'wrong' beyond simply a judgment creditor's inability to collect (otherwise, the corporate veil would be pierced in virtually every case)." The Mall at IV Group Props., LLC v. Roberts, Civ. Action No. 02-4692, 2005 U.S. Dist. LEXIS 31860, 2005 WL 3338369, at *3 (D.N.J. Dec. 8, 2005) (citing Sea-Land Servs., Inc. v. The Pepper Source, 941 F.2d 519, 522 (7th Cir. 1991)). A finding of common law fraud, however, is not necessary for the piercing of a corporate veil; "'injustice or the like' will suffice." Kuibyshevnefteorgsynthez v. Model, Civ. Action No. 93-4919, 1995 U.S. Dist. LEXIS 1896, 1995 WL 66371, at *15 (D.N.J. Feb. 6, 1995) (quoting Allied Corp. v. Frola, 701 F. Supp. 1084, 1088-89 (D.N.J. 1988)).

A. Dominance

In both their supporting and reply briefs, Defendants fail to provide [*14] any evidence to challenge Plaintiff A.I. Credit's claims of dominance. Defendants' arguments on the dominance element boil down to the following: (1) the "integrated enterprise" test is insufficient, in and of itself, to support the piercing of a corporate veil, (see Defs.' Br. 12-13; Defs.' Reply Br. 6), and (2) the conclusory statement that "Plaintiff alleges no facts that Premiere Foods, Inc. was used or misused by the [Affiliate Defendants]," (Defs.' Reply Br. 6). By contrast, Plaintiff notes that "[t]he evidence in this case established that no corporate formalities were observed" and that "there was no true financial separation between Premiere Foods and the [Affiliate Defendants]," (Pl.'s Br. 12), supporting those statements with a number of examples in its opposition brief, [4] throughout its counterstatement of material facts, [5] and by virtue of the submission of Mr. Breen's expert report. [6]

4 Plaintiff alleges that "all money from the enterprise flowed to Premiere Foods," that "all expenses of the corporations (except store employee payroll) were paid by Premiere Foods," and that "Premiere Foods' accountant testified [that] ledger entries were 'adjusted' whenever and in any manner [*15] that Bonanno and the accountant deemed appropriate." (Pl.'s Br. 13.)

5 Plaintiff states the following in its counterstatement of material facts: "all monies from the total operations were deposited into accounts of Premiere Foods," but "was not then segregated," (Pl.'s C.M.F. P 74); "if an [Affiliate Defendant's] obligations were paid from cash generated by another [Affiliate Defendant], entries would be made reflecting that the beneficiary corporation had funds 'due to' Premiere and that the corporation whose funds were used had monies 'due from' Premiere," (id. P 77); "[n]o monies . . . were ever actually transferred from Premiere Foods, Inc. to an [Affiliate Defendant] to corroborate . . . 'adjustments' to the Ledger Books" and "[n]o Promissory Notes were ever prepared and executed to reflect these obligations, and no interest was ever charged on monies owed," (id. PP 79-80); "Hunt [the CFO of Premiere Foods] never saw any directors meetings or officer meeting notes or records of any formal meetings in connection with the operations of any of the corporations," (id. P 88); and "[Hunt] saw corporate books in Premiere Foods' offices . . . . [but] they were mostly 'empty pages' and some [*16] 'boilerplate' information," (id.).

6 Mr. Breen concluded that "Bonanno controlled and operated Premiere Foods and the [Affiliate Defendants] without regard to their allegedly separate corporate existence, and

without observing corporate formalities," that "[p]rior to the fold-up of Premiere Foods, all funds of the integrated enterprise were consolidated in the accounts of Premiere Foods," and that "[i]ncome and expenses were moved among the corporations at the whim of Bonanno." (Breen Report 34.)

B. Fraud or Injustice

Defendants devote the majority of their briefing on the piercing the corporate veil claim to the fraud or injustice element. In their supporting brief, Defendants emphasize that "[t]o establish injustice, there must be some 'impropriety'" and note that New Jersey courts typically look to whether "'the corporation was formed or used for some illegal or fraudulent purpose.'" (Defs.' Br. 13-14.) Defendants argue that "[t]here is no evidence that Premiere Foods, Inc. . . . [was] created as [a] judgment-proof corporation[]" and that "[t]o the contrary, Premiere Foods, Inc. had been in existence and operating as a management company for compensation well before A.I. Credit made [*17] the Loan." (Id. 14.)

Plaintiff counters that Defendants' alleged transfer of assets from Defendant Premiere Foods to Affiliate Defendant Fifth of Nevada during the pendency of the First Action qualifies as injustice for purposes of piercing the corporate veil because the allegedly improper diversion of the income stream rendered Premiere Foods incapable of satisfying the judgment against it. (Pl.'s Br. 14-15 (comparing facts to AYR Composition, Inc. v. Rosenberg, 261 N.J. Super. 495, 619 A.2d 592 (App. Div. 1993).) In addition, Plaintiff argues that "Bonanno breached his fiduciary duty to A.I. Credit by engaging in numerous activities designed to benefit his own, personal interests." (Id. 16.)

In their reply, Defendants answer that there was no injustice in this case because Premiere Foods transferred no assets during its wind-up. (Defs.' Reply Br. 7.) Defendants also note that Premiere Foods was not a borrower in any of the GE loans. (Id.)

Superficially, given the suspicious circumstances surrounding Premiere Foods's wind-up, it appears that Plaintiff may have a basis to meet the fraud or injustice element. It strikes the Court as more than coincidental timing to reallocate a stream of income from [*18] a company facing a potential adverse judgment around the time of a summary judgment submission. Defendants do not address this issue in either their supporting or reply briefs. In fact, the only explanation for Defendants' actions comes from deposition testimony quoted in Mr. Breen's expert report. According to Mr. Breen's paraphrasing of Bonanno's deposition, "[t]he business in the Northeast and Florida had been adversely impacted by '9-11[,]' [so] [i]t was decided to shut down under-performing stores and cut expenses." (Breen Report 17.) Bonanno testified that "'it didn't make any sense to have . . . another layer of company'" and "'corporations made the decision that they would handle the administration themselves,'" which Mr. Breen points out, that as the sole shareholder, was "just Bonanno at that time." (Id. (quoting Bonanno Dep. 74).)

In reply, however, Defendants state that Premiere Foods transferred no assets to Fifth of Nevada during its wind-up. (Defs.' Reply Br. 7.) If there was no transfer of assets, there can be no calculable damages supporting Plaintiff's piercing the corporate veil claim, regardless of whether Plaintiff may be able to prove liability. In AYR [*19] Composition, which Plaintiff discusses at length in its opposition brief, the New Jersey Appellate Division found that in piercing the corporate veil, the defendants would only be liable for the value of any assets fraudulently transferred, not the entirety of the corporate debt at issue. See 261 N.J. Super. at 506-07. As the Appellate Division wrote, "[f]or example, if a corporation has $ 500,000 in debts and the corporate principals improperly transfer a few thousand dollars worth of corporate property, representing the final assets of the corporation, it would be highly unfair to charge the principals with the total corporate indebtedness which may have arisen over many years of corporate existence when the corporate form was scrupulously followed." Id. at 506.

Plaintiff has not provided any evidence to demonstrate the value of Premiere Foods's assets at the time of wind-up. When pressed during oral argument by the Court for Premiere Foods's financial information at any relevant point in time, Plaintiff could not provide the Court with any evidence that would support the existence of damages. "[T]he burden of proof is upon the plaintiff . . . to show the fact and extent of an injury [*20] and to show the amount and value of his or her damages." 22 Am. Jur. 2d Damages § 703 (2007); see also Feuerer v. Adamar of N.J., Inc., Civ. Action No. 83-5931, 1985 U.S. Dist. LEXIS 15828, 1985 WL 2781, at *1 (E.D. Pa. Sept. 19, 1985) ("No citation is necessary for the basic principle of law that plaintiff has the burden of proof as to damages as well as liability . . . ."); AYR Composition, 261 N.J. Super. at 507 ("Plaintiff has the burden of proof to demonstrate both defendants' liability and the amount of damages chargeable to defendants."). Plaintiff has failed to provide evidence to meet its burden in this instance.

Because of its failure to provide the Court with any evidence to support the existence of damages, Plaintiff lacks sufficient evidence to prove the entirety of its piercing the corporate veil claim. As such Defendants' motion for summary judgment with respect to Plaintiff's piercing the corporate veil claim is granted. [7]

7 During oral argument, Plaintiff requested that the Court give it the opportunity to supplement its briefing to remedy its failure to provide the Court with the evidence necessary to support its claim of damages. On a number of occasions, Plaintiff asserted that Defendants never [*21] raised this issue in its briefs, and as a result, the Court should not have anticipated Plaintiff's readiness to provide evidence which would combat the Court's skepticism towards whether Plaintiff would be able to prove damages. The Court disagrees.

As stated above, a basic evidentiary principle charges a plaintiff with the burden of proof of damages. Plaintiff must have known that at some point it would have been faced with providing the Court with sufficient evidence to make a showing of damages, particularly given that Magistrate Judge Ronald Hedges entered an amended final pre-trial order on March 29, 2007, suggesting a trial date in the near future if this summary judgment motion had been denied. Further, however, despite what Plaintiff stated during oral argument, the Court believes that Plaintiff should have been aware of the issue of damages solely on the basis of the briefing of this motion. Although stated tersely, Defendants' reply brief does assert that Premiere Foods transferred no assets during its wind-up. (Defs.' Reply Br. 7.) Moreover, as discussed below, Plaintiff's entire fraudulent transfer claim revolves around the issue of whether Premiere Foods, in fact, transferred [*22] assets during its wind-up. The Court does not consider it wise policy to allow a plaintiff to overlook necessary elements of its claim solely because deficiencies were not explicitly brought to its attention.

2. Fraud-Based Claims

A. Common Law Fraud or Creditor Fraud

Plaintiff's Complaint appears to bring a claim for common law fraud or creditor fraud. (See Compl. PP 36, 39.) In its opposition brief, however, Plaintiff appears to abandon any common law fraud or creditor fraud claim in favor of a fraudulent transfer claim, although its briefing is ambiguous as to whether it is actually abandoning the common law fraud claim. (See Pl.'s Br. 18-23.) Regardless of Plaintiff's intentions, however, any common law fraud or creditor fraud claim should be dismissed.

On June 27, 2005, the New Jersey Supreme Court held that an action for "creditor fraud" does not exist in New Jersey. See Banco Popular N. Am. v. Gandi, 184 N.J. 161, 175, 876 A.2d 253 (2005). In addition, an action for common law fraud is improper. The elements to establish a claim for common law fraud are as follows: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; [*23] (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." Gennari v. Weichert Co. Realtors, 148 N.J. 582, 610, 691 A.2d 350 (1997) (citation omitted). With respect to Defendants' actions surrounding Premiere Foods's wind-up in 2003, Plaintiff is unable to prove any of the elements for common law fraud. Defendants' motion for summary judgment with respect to any claims for creditor fraud or common law fraud is granted.

B. Fraudulent Transfer [8]

8 Defendants correctly point out that Plaintiff has not pled a claim for fraudulent transfer. (Defs.' Br. 5.) The only allegations in the Complaint that remotely indicate a fraud-based claim are as follows: (1) "Bonanno, through Premiere Foods and the [Affiliate Defendants], is utilizing the corporate structure of Premiere to obtain an unjust result and to perpetrate a fraud upon creditors, including A.I. Credit," (Compl. P 36); and (2) "The actions of Bonanno, Premiere Foods and the [Affiliate Defendants] constitute intentional fraud and were intended to and did in fact cause A.I. Credit to sustain substantial monetary damages . . . ," (id. P 39).

As stated above, there is no action for [*24] creditor fraud in New Jersey. See Gandi, 184 N.J. at 175. Plaintiff filed its Complaint on August 20, 2004, nearly a year before Gandi, but Defendants' motion for summary judgment was filed March 23, 2007, more than one and a half years after Gandi, giving Plaintiff ample time to amend its Complaint. Apparently, Defendants learned of Plaintiff's intent to assert a claim for fraudulent transfer in Plaintiff's Answers to Interrogatories, filed on July 21, 2005. Although the Court believes that it would be sufficient to grant Defendants' motion for summary judgment with respect to Plaintiff's "claim" for fraudulent transfer solely based on that it was not pled in Plaintiff's Complaint, it will consider Plaintiff's arguments in favor of fraudulent transfer. See Aldinger v. Spectrum Control, Inc., 207 Fed. Appx. 177, 180 n.1, 181 (3d Cir. 2006) (affirming district court's dismissal of claim that was not pled in complaint and was first raised in summary judgment opposition brief).

The Uniform Fraudulent Transfer Act governs all claims for fraudulent transfers in New Jersey. See N.J. Stat. Ann. §§ 25:2-21 - 2-34 (1997). According to § 25:2-25:

> A transfer made or obligation incurred by a debtor [*25] is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> > a. With actual intent to hinder, delay, or defraud any creditor of the debtor; or
> >
> > b. Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
> >
> > (1) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
> >
> > (2) Intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they become due.

For there to be a fraudulent transfer, however, there must be a "transfer." The statute defines "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance." § 25:2-22. An "asset" is "property of a debtor," § 25:2-21," and "property" is "anything that may be the subject [*26] of ownership," § 25:2-22.

Defendants argue that there was no transfer of an asset. (See Defs.' Br. 5-7; Defs.' Reply Br. 2-5.) In their supporting brief, Defendants assert that the only support that Plaintiff has for its fraudulent transfer claim is Mr. Breen's expert report, wherein Mr. Breen states that "[w]hen Premiere Foods was closed down, the assets and liabilities of Premiere Foods were transferred to [Fifth of Nevada]." (Breen Report 30, P 4.) Defendants, however, state that Mr. Breen's examples to support his opinion only "relate to the liabilities of Premiere Foods, Inc., not the assets." (Defs.' Br. 7.)

In its opposition brief, Plaintiff argues that three specific assets of Premiere Foods were fraudulently transferred: (1) "the income stream of administrative fees;" (2) "[v]aluable tax deductions;" and (3) "the creditworthiness of the integrated enterprise." (Pl.'s Br. 19.) The first two alleged assets were transferred to Fifth of Nevada, while the third alleged asset was "diverted through the G.E. [loans], to the benefit of Bonanno individually, and not for the benefit of arms-length creditors of Premiere Foods, such as A.I. Credit." (Id.)

In their reply, Defendants contend [*27] that "where the management agreements are not in writing, [management agreements] are deemed to **not** constitute assets as a matter of law" and that "Premiere Foods, Inc. was not a party to [the GE loans]," so "there was no conveyance, as a matter of law." (Defs.' Reply Br. 4.)

Defendants are correct that any allegation that "the creditworthiness of the integrated enterprise" was fraudulently transferred is misplaced. Section 25:2-25 begins with the following: "A transfer made or obligation incurred by a debtor is fraudulent as to a creditor . . . ." (emphasis added). The definition of debtor is "a person who is liable on a claim," § 25:2-21, which in this case is Premiere Foods, as guarantor. Because, as Plaintiff states in its counterstatement of material facts, "Premiere Foods was not a guarantor for the [GE] loan[s] nor was it a recipient of any of the proceeds of the loan[s]," (Pl.'s C.M.F. P 124), Premiere Foods could not have made a transfer or incurred an obligation with respect to the GE loans. The statute is clear as to the status of the parties to which it applies; Plaintiff's allegations of an "integrated enterprise" are simply insufficient to find liability based on a theory [*28] of fraudulent transfer.

Whether summary judgment should be granted, dismissing the entirety of Plaintiff's potential claim for fraudulent transfer, revolves around the issue of whether "the income stream of administrative fees" and "valuable tax deductions" are assets for purposes of New Jersey's version of the Uniform Fraudulent Transfer Act. Although the New Jersey Supreme Court has made no pronouncement with respect to this issue, Defendants point to Karo Marketing Corp. v. Playdrome America, 331 N.J. Super. 430, 752 A.2d 341 (App. Div. 2000), abrogated, on other grounds, by Gandi, 184 N.J. at 175, which is instructive.

In Karo a management company had oral contracts with a number of operating companies that were part of the same organizational structure, whereby it received a management fee for determining marketing strategy and overall policy for the companies. See 331 N.J. Super. at 436. The management company owed money for services rendered by the plaintiff, and the plaintiff alleged that immediately preceding a negative judgment in an earlier case brought by the plaintiff against the management company, the management company became judgment-proof as it "was effectively stripped of its only [*29] real asset -- the income source from its contract or contracts with the operating companies." Id. at 434-35, 440. The management activities were transferred to a new company that was created solely to overtake the prior management company's activities. See id. at 435. The New Jersey Appellate Division affirmed the trial court's ruling that there was no fraudulent transfer because no asset of value was transferred. See id. at 437-38, 444. The trial court found that the management company had "few significant assets and its only source of income was an oral contract or contracts with the operating companies which contracts were terminable at will." Id. at 437. The court concluded that "the . . . contract had no value and therefore was not an asset of value." Id. at 438; see also In re LiTenda Mortgage Corp., 246 B.R. 185, 190-94 (Bankr. N.J. 2000) (holding that Trustee failed to state cause of action under Uniform Fraudulent Transfer Act because there was no transfer, where defendant terminated servicing agreement with plaintiff pursuant to terms of contract, denying plaintiff proceeds of servicing agreement which was its primary source of income).

According to the Complaint, "[a]t all [*30] relevant times Premiere was paid a service fee by the [Affiliate Defendants], which fee was determined on an *ad hoc* basis by Bonanno and Bonomo and which was not set forth in any writing nor set by any predetermined agreement or formula." (Compl. P 30(f).) [9] Given the alleged "ad hoc" nature of Premiere Foods's relationship with the Affiliate Defendants, "the income stream of administrative fees" cannot be found to be a fraudulently transferred asset. Premiere Foods did not transfer anything to Fifth of Nevada when it allegedly assumed Premiere Foods's management activities; rather, the Affiliate Defendants simply took their business elsewhere.

9 In addition, Plaintiff's counterstatement of material facts states that "there weren't any written agreements between the [Affiliate Defendants] and Premiere regarding the administrative fees," (Pl.'s C.M.F. P 70), and paraphrases CFO Hunt's deposition testimony, stating that "the partnership agreements stipulated that 'a management company that was selected by the general partner' . . . would receive a management fee, and Premiere performed that function for all of the partnerships because 'the general partner had the right to select whatever [*31] management company they (sic) decided,'" (id. P 66).

As for the "valuable tax deductions," those, too, were not fraudulently transferred assets. Because Plaintiff does not provide any explanation in its opposition brief as to how these tax deductions are assets, it is necessary to infer from Mr. Breen's expert report when and how Premiere Foods allegedly transferred these tax deductions. According to Mr. Breen, a number of bookkeeping entries resulted in Bonanno's ability to take a tax deduction that allowed him to pay no taxes on $ 5,146,178.00 that he had received as distributions from Fifth of Nevada. (Breen Report 28-29, P 1.) Essentially, Premiere Foods reclassified $ 6,785,644.88 owed to the Affiliate Defendants as being owed to Fifth of Nevada as an "Accounts Payable." (Id.) Fifth of Nevada recorded those funds as an "Accounts Receivable" and then recorded as a liability the funds that it now owed to the Affiliate Defendants. (Id.) Premiere Foods wrote off the Accounts Payable to Fifth of Nevada and recorded a debt forgiveness of the same amount as miscellaneous income. (Id.) Fifth of Nevada wrote off the Accounts Receivable from Premiere Foods as uncollectible, recording a bad [*32] debt expense of $ 6,785,644.88. (Id.) The resulting loss was passed to Bonanno's personal tax return due to Fifth of Nevada's status as an 1120 S-Corporation. (Id.)

Although Bonanno certainly received a benefit as a result of his ability to take the tax deduction, no asset was transferred by Premiere Foods to Fifth of Nevada. All that was transferred was liability of $ 6,785,644.88.

Because no assets were transferred during Premiere Foods's wind-up, Defendants' motion for summary judgment is granted with respect to any potential claim for fraudulent transfer.

3. Unjust Enrichment

To establish a claim of unjust enrichment, "a plaintiff must show both that defendant received a benefit and that retention of that benefit without payment would be unjust." VRG Corp. v. GKN Realty Corp., 135 N.J. 539, 554, 641 A.2d 519 (1994) (citations omitted). "The unjust enrichment doctrine requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure of remuneration enriched defendant beyond its contractual rights." Id. (citations omitted).

In their supporting brief, Defendants provide two arguments in favor of dismissal of [*33] Plaintiff's claim for unjust enrichment: (1) the six-year statute of limitation governing unjust enrichment actions has expired, (Defs.' Br. 16-17); and (2) given the existence of the loan documentation between A.I. Credit, Premiere Foods, and the LLC, an action for unjust enrichment is barred, (id. 17-18). Notably, throughout their supporting brief, Defendants assume the bases of Plaintiff's unjust enrichment claim are the events of June and July 1996 -- i.e., the forwarding of loan proceeds.

Plaintiff, however, counters that "the cause of action for unjust enrichment arises from Bonanno's actions relating to the wind-up of the affairs of [Premiere Foods] in 2003, and not from the 1996 loan agreement with A.I. Credit." (Pl.'s Br. 25.) [10] Repeating its arguments supporting its claims for piercing the corporate veil and fraudulent transfer, Plaintiff states that "Bonanno had a duty to A.I. Credit to preserve Premiere Foods' assets for the satisfaction of its creditors" and that "Bonanno also had a duty not to cause the fraudulent transfer of assets of Premiere Foods," concluding that "Bonanno breached these duties, and has received substantial benefits, at the expense of A.I. Credit." [*34] (Id.)

10 Defendants' confusion as to the basis of Plaintiff's claim is completely reasonable as the Complaint states only that "Bonanno and the [Affiliate Defendants] have been unjustly enriched at the expense of A.I. Credit as a result of their wrongful actions, including, without limitation, the receipt by Bonanno of a multi-million dollar life insurance policy for his personal benefit." (Compl. P 41.)

To the extent that Plaintiff believes a cause of action for unjust enrichment arises from Defendants' activities in the wind-up of Premiere Foods in 2003, it is mistaken. An unjust enrichment claim requires a showing not only that a defendant received a benefit, but that the benefit was received from a plaintiff. Defendants did not receive any benefit from Plaintiff in 2003; the sole benefit received from Plaintiff was in June and July 1996, when the funds were forwarded.

Given that the benefit from Plaintiff was received, at the latest, on July 31, 1996, any claim for unjust enrichment is time-barred. New Jersey has adopted a six-year statute of limitation for non-personal injury actions involving monetary damages, a grouping which includes unjust enrichment actions. N.J. Stat. Ann. § 2A:14-1 [*35] (2000); see Baer v. Chase, 392 F.3d 609, 621-22 (3d Cir. 2004). The cause of action accrues during the "last rendition of services," as "[t]he essence of a quasi-contract claim is not the expectancy of the parties, but rather the unjust enrichment of one of them." Baer, 392 F.3d at 622-23. The last rendition of services in this case was on July 31, 1996, the date that Defendants received the last of the funds, over eight years from the filing of this action. Defendants' motion for summary judgment regarding Plaintiff's claim of unjust enrichment is granted. [11]

11 Defendants' additional argument with respect to unjust enrichment (i.e., that the action is barred due to the existence of the original loan documentation), as well as its res judicata and attorneys fees arguments are moot, given the Court's other rulings on this summary judgment motion.

CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is granted.

November 5, 2007

s/ William H. Walls

United States Senior District Judge

LEXSEE

Agway, Inc. v. Ralph Teitscheid and Ann Marie Teitscheid

No. 82-471

Supreme Court of Vermont

144 Vt. 76; 472 A.2d 1250; 1984 Vt. LEXIS 413; 38 U.C.C. Rep. Serv. (Callaghan) 818

January 20, 1984, Opinion filed

PRIOR HISTORY: [***1] **Appeal** from judgment for plaintiff in an action to collect money due and owing. District Court, Unit No. 2, Addison Circuit, *Cashman*, J., presiding.

DISPOSITION: *Affirmed.*

COUNSEL: *William H. Meub* and *Olin R. McGill Jr.* of *Kelley & Meub, Ltd.*, Middlebury, for Plaintiff-Appellee.

Mark L. Sperry and *James W. Swift* of *Langrock Sperry Parker & Wool*, Middlebury, for Defendants-Appellants.

JUDGES: Billings, C.J., Hill, Underwood, Peck and Gibson, JJ.

OPINION BY: UNDERWOOD

OPINION

[*77] [**1251] Plaintiff, Agway, Inc., sued to recover the balance due and owing by defendants for carpeting it installed in defendants' home. Defendants, who had accepted the carpeting, alleged in their answer that it was defective and that plaintiff had breached its warranty of merchantability. The district court concluded defendants had not given timely notice of any such breach and entered judgment for the plaintiff in the amount of $ 1,154.25. Defendants appealed. We affirm the district court.

The pertinent facts are straightforward. In July of 1979 plaintiff sold and installed several new carpets in a house defendants were remodeling. The complete purchase price was $ [***2] 2,389.99, and prior to delivery defendants had paid plaintiff about $ 1,600.00. After installation, defendants telephoned plaintiff to indicate their dissatisfaction with the carpets. They complained that some of the carpet seams were coming up and that there was "pilling," a deterioration of the carpet fabric resulting in a loss of fabric. Plaintiff went to defendants' home and corrected the seam problem, and at the same time advised defendants that pilling was normal for new carpet and would cease after several vacuumings.

The pilling did cease on two of the carpets, but not on another. On one carpet they experienced continued pilling well beyond the period normal for new carpet. The defendants, however, never again notified plaintiff of this ongoing problem with one carpet but instead made several promises to pay the amount remaining. The court below found that two months after installation defendants "were again requested to make [*78] payment and indicated they were still willing to make payment and made no complaint at that time to the plaintiff regarding the continuing deterioration of the rugs."

In August of 1980, nearly one year after the installation of the carpets, [***3] plaintiff sued to recover the money still due under the contract. In their answer, defendants advanced an affirmative defense that amounted to a charge of breach of contract based [**1252] upon breach of the implied warranty of merchantability under 9A V.S.A. § 2-314(2)(c). The district court concluded that defendants had accepted the carpets, 9A V.S.A. § 2-606, but failed to give plaintiff notice of any breach within a reasonable time. 9A V.S.A. § 2-607(3)(a). [1] It further concluded that this barred defendants from any remedy. *Id.*

1 9A V.S.A. § 2-607(3)(a) provides:

> (3) Where a tender has been accepted
>
> (a) the buyer must within a reasonable time after he discovers or should have discovered any

> breach notify the seller of breach or be barred from any remedy . . . .

On appeal, defendants argue that they notified plaintiff of the breach of warranty within a reasonable time, that the court's findings are erroneous, and that the subject carpet is defective.

The dispositive [***4] provision of this appeal is 9A V.S.A. § 2-607(3)(a). Once a buyer accepts goods, the time for rejection has passed. 9A V.S.A. § 2-607(2). Since defendants accepted the carpets, 9A V.S.A. § 2-606, and never attempted to revoke that acceptance, 9A V.S.A. § 2-608, rejection and revocation were unavailable. The buyer's remedies under these circumstances are governed by 9A V.S.A. § 2-714(1), [2] and this section is predicated upon the notice required in 9A V.S.A. § 2-607(3).

2 9A V.S.A. § 2-714(1) provides:

> (1) Where the buyer has accepted goods and given notification (subsec. (3) of § 2 -- 607) he may recover as damages for any non-conformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

In this case there were two acts by which defendants claim to have satisfied 9A V.S.A. § 2-607(3)(a). First, defendants maintain that their phone call shortly after installation of the carpets was [***5] adequate and timely notice. Although not specific, [*79] the trial court's findings indicate that the phone call was made soon after installation; thus the phone call satisfied the "reasonable time" requirement of 9A V.S.A. § 2-607(3)(a). It was, however, insufficient to indicate notice of a breach of contract. See *K & M Joint Venture v. Smith International, Inc.*, 669 F.2d 1106, 1113 (6th Cir. 1982). At most, the phone call indicated a present dissatisfaction with the carpet's performance.

Comment 4 to 9A V.S.A. § 2-607 gives some indication of the kind of notice required. "The content of the notification need merely be sufficient to let the seller know that the transaction is *still* troublesome and must be watched." (Emphasis added.) Testimony at trial indicated that most, if not all, new carpet is susceptible to some pilling. Plaintiff advised defendants that after several vacuumings the pilling would cease, and the record indicates that the pilling in two other carpets did stop. The continued pilling in the subject carpet after several vacuumings then became a continuing problem that should have been brought to plaintiff's attention. Defendants were [***6] in the best position to determine if it was "still troublesome." Comment 4 goes on to say that "[the] notification which saves the buyer's rights under this Article need only be such as *Informs the seller that the transaction is claimed to involve a breach . . . .*" (Emphasis added.) Next, we must evaluate defendants' actions in this case, to determine whether they amount to a claim of breach.

When evaluating the sufficiency of a notice of breach under 9A V.S.A. § 2-607(3)(a) we will look to all the circumstances of the case. *T. J. Stevenson & Co. v. 81,193 Bags of Flour*, 629 F.2d 338, 359 (5th Cir. 1980). One court, in a commercial context, has held that

> [even] though adequate notice may have been given at one point in the transaction, subsequent actions by the buyer may have dissipated its effect.

Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 978 (5th Cir. 1976). In the instant case, however, adequate notice of a claim of breach was never given. Based upon the failure of defendants' telephone call to apprise plaintiff of anything more than present dissatisfaction, and upon [**1253] defendants' [*80] subsequent [***7] assurances that the money remaining on the contract would be paid, we hold that, prior to filing their affirmative defense in the lawsuit, defendants never gave plaintiff notice of a breach of contract as required by 9A V.S.A. § 2-607(3)(a).

The defendants also claim that the affirmative defense in their answer to plaintiff's complaint constituted timely notice under 9A V.S.A. § 2-607(3)(a). Defendants rely on *Desilets Granite Co. v. Stone Equalizer Corp.*, 133 Vt. 372, 374-75, 340 A.2d 65, 67 (1975), to support their position. In *Desilets*, we observed that: "The serving of a complaint for breach of warranty, *properly timed*, might in some cases constitute notice of revocation . . . ." *Id.* (Emphasis added.)

The timeliness of notice under 9A V.S.A. § 2-607(3)(a) is ordinarily a question of fact for the trier. *Allen Food Products, Inc. v. Block Brothers, Inc.*, 507 F. Supp. 392, 394 (S.D. Ohio 1980). When defendants' dissatisfaction was initially met by plaintiff's assurance that some pilling was normal, and when defendants assured plaintiff that payment was forthcoming, an affirmative defense filed almost thirteen months after installation [***8] of the carpet is not reasonable to alert plaintiff to a claimed breach of contract. Other courts have found even shorter periods insufficient under 9A V.S.A. § 2-607(3)(a). *Klockner, Inc.* v. *Federal Wire Mill Corp*., 663 F.2d 1370, 1378 (7th Cir. 1981) (notice of breach of warranty made by buyer's counterclaim eight months after delivery held unreasonable under 9A V.S.A. § 2-607(3)(a)); *International Paper Co.* v. *Margrove, Inc*., 75 Misc. 2d 763, 765, 348 N.Y.S.2d 916, 919 (Sup. Ct. 1973) (answer and counterclaim filed five months after delivery insufficient under 9A V.S.A. § 2-607(3)(a)). We hold that defendants' affirmative defense, while arguably sufficient notice of a breach, was not communicated to plaintiff "within a reasonable time." 9A V.S.A. § 2-607(3)(a).

Defendants next contend that the trial court erred by making inconsistent findings; once the court found that they complained by phone shortly after installation of the carpet, defendants argue that it "should be impossible to find that inadequate notice of the defect was given." Defendants seem to misconceive the difference between a customer complaint, on one [*81] hand, and notice [***9] of a breach under 9A V.S.A. § 2-607(3)(a) on the other. While perhaps the trial court could have been more explicit in its findings, they do not constitute clear error. V.R.C.P. 52; *Finley* v. *Williams*, 142 Vt. 153, 155, 453 A.2d 85, 86 (1982).

Finally, defendants argue that the carpet that continued pilling was defective. While there was some evidence adduced below that the carpet was substantially impaired in value, this is of no consequence in view of our disposition of the case. Since we have decided that defendants never gave plaintiff timely notice of a claimed breach, defendants are now barred from any remedy. 9A V.S.A. § 2-607(3)(a).

Affirmed.

LEXSEE

SAMUEL P. ALLOWAY, III, AND NEW HAMPSHIRE INSURANCE CO., PLAINTIFFS-RESPONDENTS, v. GENERAL MARINE INDUSTRIES, L.P., DEFENDANT-APPELLANT, AND MULLICA RIVER BOAT BASIN, DEFENDANT.

A-48 September Term 1996

SUPREME COURT OF NEW JERSEY

149 N.J. 620; 695 A.2d 264; 1997 N.J. LEXIS 186; CCH Prod. Liab. Rep. P15,007; 32 U.C.C. Rep. Serv. 2d (Callaghan) 1040

November 18, 1996, Argued
June 30, 1997, Decided

PRIOR HISTORY: [***1] On certification to the Superior Court, Appellate Division, whose opinion is reported at: 288 N.J. Super. 479, 672 A.2d 1177 (1996).

COUNSEL: *John C. Penberthy, III,* argued the cause for appellant (*Mesirov Gelman Jaffe Cramer & Jamieson,* attorneys; *Mr. Penberthy* and *Matthew O. Dickstein,* on the brief).

Sanford F. Schmidt and *Edward A. Penberthy* argued the cause for respondents (*Brandt Haughey Penberthy Lewis & Hyland,* attorneys for *Samuel P. Alloway, III,* and *Mr. Schmidt,* attorney for New Hampshire Insurance Co.; *Suzanne E. Bragg,* on the brief).

JUDGES: The opinion of the Court was delivered by POLLOCK, J. HANDLER, J., concurring. Justice STEIN joins in this opinion. HANDLER and STEIN, JJ., concur in result. Chief Justice PORITZ, and Justices HANDLER, POLLOCK, O'HERN, GARIBALDI, STEIN and COLEMAN.

OPINION BY: [***8] Stewart G. Pollack

OPINION

[*622] [**265] The opinion of the Court was delivered by

POLLOCK, J.

The primary issue is whether New Hampshire Insurance Co. ("New Hampshire") and its insured, Samuel P. Alloway III ("Alloway") (jointly described as "plaintiffs") may recover from General [*623] Marine Industries, Inc. ("GMI") in negligence and strict liability for economic loss caused by a defect in a power boat purchased by Alloway and insured by New Hampshire. Alloway purchased the boat from Mullica River Boat Basin ("Mullica"), a retail boat dealer, and insured it with New Hampshire under a comprehensive general insurance policy. Mullica had purchased the boat from Century Boats ("Century"), an unincorporated division of Glasstream Boats, Inc. ("Glasstream"), the manufacturer. Subsequently, Glasstream went bankrupt, and GMI, formerly known as GAC Partners, P.L. ("GAC"), purchased Glasstream's assets.

Allegedly because of a defective seam in the swimming platform, water seeped into the boat, which sank while docked. New Hampshire paid Alloway under the policy. Alloway then subrogated New Hampshire to his rights, subject to Alloway's claim for the deductible portion of his loss.

Plaintiffs instituted this action to recover [***9] for their respective economic losses. The Law Division granted GMI's motion to dismiss, holding that plaintiffs could not recover for economic loss resulting from damage to the boat itself. It held that plaintiffs' only claim was for breach-of-warranty under the Uniform Commercial Code ("U.C.C."), a claim barred by 11 *U.S.C.A.* § 363 ("§ 363") of the Bankruptcy Code. The Appellate Division reversed, holding that plaintiffs could [**266] recover in tort for the economic loss and that the Bankruptcy Code did not bar recovery. 288 *N.J. Super.* 479, 672 A.2d 1177 (1996). We granted certification, 145 N.J. 372, 678 A.2d 713 (1996). We reverse the judgment of the Appellate Division and reinstate that of the Law Division.

I.

From the limited record, the following facts emerge. In October 1989, Glasstream filed a voluntary petition in bankruptcy. Five months later, the Bankruptcy Court directed Glasstream to sell substantially all of its assets to GMI "free and clear of any interest in such property." At some unspecified time, Glasstream made the boat and sold it to Mullica.

[*624] On July 14, 1990, Alloway purchased the boat, a new thirty-three foot Century Grande XL ("Grande") boat from Mullica. The purchase price was $ 61,070. [***10] Century expressly warranted for twelve months from the date of purchase that the boat was "free from defects in material and workmanship under normal use and when operated according to instructions." Alloway obtained from New Hampshire a comprehensive general insurance policy on the boat.

Three months later, while docked at the Bayview Marina in Manahawkin, New Jersey, the Grande sank. No other property was damaged, and no one sustained personal injuries.

Alloway filed a claim with New Hampshire, which spent $ 40,106.63 to repair the boat. Alloway, who had a $ 2,500 deductible under the policy, paid $ 2,490 towards the repairs. After completion of the repairs, he received a trade-in credit of $ 38,770 for the Grande on the purchase of a new boat.

Thereafter, Alloway filed a three-count complaint against Mullica and GMI, seeking recovery for his economic loss. In count one, Alloway sought to recover for Mullica's breach of "the manufacturer's warranty" for "repair or replacement of any part found to be defective." Count two alleged a strict-liability claim asserting that Century had manufactured a defective boat for which GMI was liable as Century's successor. Count three alleged [***11] that Glasstream, "negligently manufactured and inspected the boat," that GMI was liable to Century's successor, and that Mullica had failed to discover the defect.

Alloway then assigned his claims to New Hampshire, but retained a claim for the loss in value of the boat. He sought the $ 2,490 he had paid towards the repair of the boat, "[t]he difference in value between the price paid for the boat and the market value of the boat in its defective condition," attorneys' fees, and costs. Thereafter, plaintiffs filed an amended complaint asserting, in addition to Alloway's original claims, New Hampshire's claim for the cost of repairs.

[*625] On October 3, 1991, GMI, as successor to Glasstream, removed the action to the United States District Court for the District of New Jersey, which referred the matter to the Bankruptcy Court. Alloway and New Hampshire filed a proof of claim as unsecured creditors. The Bankruptcy Court then remanded the matter to the Law Division.

The Law Division granted GMI's motion to dismiss for failure to state a cause of action. It relied on *Spring Motors Distribs. v. Ford Motor Co.*, 98 N.J. 555, 489 A.2d 660 (1985), which held that a purchaser could not maintain an action [***12] in strict liability for economic loss. It also relied on *D'Angelo v. Miller Yacht Sales*, 261 *N.J. Super.* 683, 619 A.2d 689 (1993), in which the Appellate Division held that a consumer who had purchased a yacht that was not as represented could sue the manufacturer under the U.C.C. for breach of warranty, but not in strict liability. According to the *D'Angelo* court, the U.C.C. provides a consumer with the exclusive remedy for economic loss resulting from the breach of express or implied warranties. *Id.* at 688, 619 A.2d 689. The Law Division reasoned that because plaintiffs sought to recover for economic loss to the boat itself, GMI was not liable as Glasstream's successor.

Because Mullica's insurer was insolvent, New Hampshire dismissed its subrogation claim against Mullica. *See* *N.J.S.A.* 17:30A-5, -8 (denying subrogation claims against insured of insolvent insurer). Alloway then settled his claim against Mullica, thereby extinguishing [**267] plaintiffs' claims for breach of warranty. Thus, Alloway has already received payment from New Hampshire for the cost of repairs, less the $ 2,500 deductible under his policy, and an undisclosed sum in settlement of his claim against Mullica.

The Appellate [***13] Division reversed, relying on *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965), which recognized that a consumer could maintain a strict-liability claim against a manufacturer for loss of value of a defective carpet. According to the Appellate Division, *Spring Motors* precluded a [*626] commercial purchaser, but not a consumer, from recovering in strict liability. 288 *N.J. Super.* at 486-87, 672 A.2d 1177. Observing that *Spring Motors* declined to reconsider *Santor,* the Appellate Division concluded that "[s]ince *Santor* has not been overruled, we must follow it." *Id.* at 488, 672 A.2d 1177. In so holding, the court rejected the Appellate Division's holding in *D'Angelo, supra,* 261 *N.J. Super.* 683, 619 A.2d 689.

The Appellate Division also concluded that plaintiffs could recover against GMI as the successor to Glasstream. The court relied on *Ramirez v. Amsted Industries, Inc.*, 86 N.J. 332, 431 A.2d 811 (1981), which permitted a worker who was injured by a defective power press to maintain a strict-liability action against a defendant that had purchased the assets of the manufacturer of the press. According to the Appellate Division, the right to recover in strict liability against a successor [***14] owner should not depend on whether the recovery was for personal injuries or economic loss. 288 *N.J. Super.* at 490-91, 672 A.2d 1177. In addition, the court reasoned that the Bankruptcy Court's sale of the boat "free and clear of any interest in [the boat]" did not extend to lawsuits and, therefore, did not bar the instant action. *Id.* at 493, 672 A.2d 1177. Finally, the court held that a suit against GMI as the purchaser of Century's assets in the bankruptcy sale did not constitute a claim against Century. Consequently, plaintiffs' suit against GMI did not offend the Bankruptcy Code's scheme for the priority of claimants. *Ibid.* Essentially, the Appellate Division held that GMI, as the successor to Glasstream, was liable to plaintiffs in negligence and strict liability for economic loss caused by the sinking of the boat.

II.

The threshold issue is whether plaintiffs may rely on theories of strict liability and negligence to recover damages for economic loss resulting from a defect that caused injury only to the boat itself. Plaintiffs seek damages for the cost of repair and for the boat's lost value on trade-in. They do not allege that other property was [*627] damaged or that anyone sustained personal [***15] injuries. The question reduces to whether plaintiffs may use tort theories to recover the lost benefit of their bargain from the purchaser of the manufacturer's assets, GMI.

Preliminarily, economic loss encompasses actions for the recovery of damages for costs of repair, replacement of defective goods, inadequate value, and consequential loss of profits. *See* James J. White & Robert S. Summers, *Uniform Commercial Code* 534-44 (3d ed.1988); Note, *Economic Loss in Products Liability Jurisprudence,* 66 *Colum. L. Rev.* 917, 918 (1966). Economic loss further includes "the diminution in value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold." Comment, *Manufacturers' Liability to Remote Purchasers For 'Economic Loss' Damages--Tort or Contract?,* 114 *U. Pa. L. Rev.* 539, 541 (1966).

Allocation of economic loss between a manufacturer and a consumer involves assessment of tort and contract principles in the determination of claims arising out of the manufacture, distribution, and sale of defective products. Generally speaking, tort principles are better suited to resolve claims for personal [***16] injuries or damage to other property. *See* *Spring Motors Corp., supra*, 98 N.J. at 579-80, 489 A.2d 660; *East River S.S. v. Transamerica Delaval*, 476 *U.S.* 858, 871-72, 106 *S. Ct.* 2295, 2302-03, 90 *L. Ed.*2d 865 (1986); *Seely v. White Motor Co.*, 63 Cal. 2d 9, 45 Cal. Rptr. 17, 403 *P.*2d 145, 149-51, (1965); *Bocre Leasing Corp. v. General Motors Corp.*, 84 N.Y.2d 685, 621 N.Y.S.2d 497, 499, 645 *N.E.*2d 1195, 1197 (1995). Contract principles more readily respond to claims for [**268] economic loss caused by damage to the product itself. *See* *Spring Motors, supra*, 98 N.J. at 580, 489 A.2d 660; *East River, supra*, 476 *U.S.* at 871-72, 106 *S. Ct.* at 2302, 90 *L. Ed.*2d 865; *Seely, supra*, 45 *Cal.Rptr.* 17, 403 *P.*2d at 149-51; *Lewinter v. Genmar Indus.*, 26 Cal. App. 4th 1214, 32 *Cal. Rptr.*2d 305, 309 (1994); *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 *So.* 2d 899, 901-02 (Fla.1987); *Oceanside At Pine Point v.* [*628] *Peachtree Doors, Inc.*, 659 *A.*2d 267, 270 (Me.1995); *Bocre Leasing, supra*, 621 *N.Y.S.2d* at 501, 645 *N.E.*2d at 1199.

Various considerations support the distinction. Tort principles more adequately address the creation of an unreasonable risk of harm when a person or other property sustains accidental or [***17] unexpected injury. *See* *Spring Motors, supra*, 98 N.J. at 570-71, 579-80, 489 A.2d 660. When, however, a product fails to fulfill a purchaser's economic expectations, contract principles, particularly as implemented by the U.C.C., provide a more appropriate analytical framework. *See* *East River, supra*, 476 *U.S.* at 871-75, 106 *S. Ct.* at 2302-04, 90 *L. Ed.*2d 865; *Casa Clara v. Charley Toppino & Sons*, 620 *So.* 2d 1244, 1247 (Fla.1993); *Oceanside, supra*, 659 *A.*2d at 270; *Bocre Leasing, supra*, 645 *N.E.*2d at 1198-99; *Waggoner v. Town & Country Mobile Homes*, 808 *P.*2d 649, 652-53 (Okla.1990). Implicit in the distinction is the doctrine that a tort duty of care protects against the risk of accidental harm and a contractual duty preserves the satisfaction of consensual obligations. *Casa Clara, supra*, 620 *So.* 2d at 1246-47; *Spring Motors, supra*, 98 N.J. at 579, 489 A.2d 660.

Relevant to the distinction are "the relative bargaining power of the parties and the allocation of the loss to the better risk-bearer in a modern marketing system." *Spring Motors, supra*, 98 N.J. at 575, 489 A.2d 660; *see* *East River, supra*, 476 *U.S.* [***18] at 871-73, 106 *S. Ct.* at 2302-03, 90 *L. Ed.*2d 865. Perfect parity is not required for a finding of substantially equal bargaining power. *Spring Motors, supra*, 98 N.J. at 576, 489 A.2d 660. Although a manufacturer may be in a better position to absorb the risk of loss from physical injury or property damage, a purchaser may be better situated to absorb the "risk of economic loss caused by the purchase of a defective product." *Ibid.*; *see* *East River, supra*, 476 *U.S.* at 871, 106 *S. Ct.* at 2302, 90 *L. Ed.*2d 865 (noting purchaser can insure against risk of economic loss); *Lucker Mfg. v. Milwaukee Steel Foundry*, 777 *F. Supp.* 413, 416-17 (E.D. Pa. [*629] 1991) (same); *Bocre Leasing, supra*, 621 N.Y.S.2d at 498, 645 *N.E.*2d at 1196 (same).

In the present case, nothing indicates that Alloway was at a disadvantage when bargaining for the purchase of the boat. Moreover, a thirty-three foot luxury boat with a swimming platform is not a necessity.

Additionally, Alloway prudently protected himself against the risk of loss by obtaining an insurance policy that distributed that risk to his insurer, New Hampshire. To this extent, the question becomes whether GMI, which acquired [***19] the assets of the bankrupt manufacturer, or New Hampshire, which is in the business of insuring against the risk of harm caused by defective products, can better bear the risk of loss from damage to the boat. *See generally* *East River, supra*, 476 *U.S.* at 871-72, 106 *S. Ct.* at 2302, 90 *L. Ed.*2d 865; *Bocre Leasing, supra*, 621 N.Y.S2d at 498, 500-01, 645 *N.E.*2d at 1196, 1198-99.

Also involved is an appreciation of the relative roles of the legislative and judicial branches in defining rights and duties in commercial transactions. Absent legislation, courts possess greater latitude in determining those rights and duties. Once the Legislature acts, respect for it as a co-equal branch of government requires courts to consider the legislation in determining the limits of judicial action. *See* *Spring Motors, supra*, 98 N.J. at 577, 489 A.2d 660; *see also* *Danforth v. Acorn Structures, Inc.*, 608 *A.*2d 1194, 1200-01 (Del.1992) (declining to displace provisions of U.C.C. with tort actions). By enacting the U.C.C., the Legislature adopted a comprehensive system for compensating consumers for economic loss arising from the purchase of defective products. *See* *Spring Motors, supra*, [***20] 98 N.J. at 577, 489 A.2d 660; *Danforth, supra*, 608 *A.*2d at 1194, 1200-01; *Waggoner, supra*, 808 *P.*2d at 653. The U.C.C. represents the Legislature's attempt to strike the proper balance in the [**269] allocation of the risk of loss between manufacturers and purchasers for economic loss arising from injury to a defective product. *See generally* James J. White & Robert S. Summers, 1 *Uniform Commercial Code* 582 (4th ed.1995); *East River, supra*, 476 *U.S.* at 872-73, 106 *S. Ct.* at 2302-04, [*630] 90 *L.Ed.*2d 865; *Seely, supra*, 45 Cal.Rptr. at 20, 403 *P.*2d at 148; *Spring Motors, supra*, 98 N.J. at 577, 489 A.2d 660; *Bocre Leasing*, *supra*, 62 *N.Y.S.*2d at 498, 645 *N.E.*2d at 1196.

Consequently, the U.C.C. provides for express warranties regarding the quality of goods, *N.J.S.A.* 12A:2-313, as well as an implied warranty of merchantability, *N.J.S.A.* 12A:2-314, and an implied warranty of fitness for a particular purpose, *N.J.S.A.* 12A:2-315. When a seller delivers goods that are not as warranted, the buyer may recover the difference between the value of the defective goods and their value if they had been as warranted. Furthermore, a provision in a merchant's form is not binding [***21] on a consumer unless the consumer has signed the form. *N.J.S.A.* 12A:2-209(2). A consumer, moreover, may recover incidental and consequential damages. *N.J.S.A.* 12A:2-715(1), (2); *N.J.S.A.* 12A:2-714. In addition, the Legislature has directed courts to construe the U.C.C. liberally and to promote the U.C.C.'s underlying purposes and policies. *N.J.S.A.* 12A:1-102(1).

As a counterbalance, the U.C.C. allows manufacturers to limit their liability through disclaimers, except for personal injuries. *N.J.S.A.* 12A:2-316. Further, the U.C.C. allows parties to modify or limit damages by agreement. *N.J.S.A.* 12A:2-719. Finally, the U.C.C. provides a four-year statute of limitations to institute an action under its provisions. *N.J.S.A.* 12A:2-725. This comprehensive scheme offers significant protection to consumers while insuring that merchants are not saddled with substantial and uncertain liability. *See* *East River, supra*, 476 *U.S.* at 874, 106 *S. Ct.* at 2303-04, 90 *L. Ed.*2d 865.

Over thirty years ago, before the U.C.C. took effect, this Court ruled that strict liability in tort provided more suitable relief than an action for breach of an implied [***22] warranty of merchantability. *Santor, supra*, 44 N.J. at 53, 207 A.2d 305. The Court reached this unprecedented result notwithstanding that an action for breach of implied warranty, like one in strict liability, did not require privity between the purchaser and the manufacturer. *See* *id.* at 60-63, 207 A.2d 305.

[*631] Disagreement with *Santor* was not long in coming. In *Seely, supra*, 63 *Cal.*2d 9, 45 *Cal.Rptr.* 17, 403 *P.*2d 145, which was decided four months after *Santor,* the purchaser of a defective truck sued for damage to the truck and lost profits from his inability to use it in his heavy-duty hauling business. Writing for the California Supreme Court, Chief Justice Roger Traynor recognized the purchaser's claim for breach of an express warranty, but rejected his claim in strict liability. In reaching that result, Chief Justice Traynor reasoned that absent personal injury or property damage, strict liability in tort was not designed "to undermine the warranty provisions of the . . . Uniform Commercial Code but, rather, to govern the distinct problem of physical injuries." *Id.* 45 *Cal.Rptr.* at 21, 403 *P.*2d at 149.

Twenty years later, we addressed "the rights of a commercial buyer to recover for economic loss caused by the purchase of defective [***23] goods." *Spring Motors, supra*, 98 N.J. at 560, 489 A.2d 660. In that case, Spring Motors Distributors ("Spring Motors"), a commercial lessor of vehicles, bought a fleet of trucks from Ford Motor Co. ("Ford"). *Id.* at 562, 489 A.2d 660. Pursuant to the sales, Ford issued an express warranty on transmissions manufactured by Clark Equipment Co. ("Clark"), which had issued express warranties to Ford. Spring Motors' lessee experienced difficulties with the transmissions. *Id.* at 563, 489 A.2d 660. Consequently, Spring Motors suffered economic losses, which included costs of repair, lost profits, and a decrease in the market value of the trucks. *Id.* at 564, 489 A.2d 660. Thereafter, Spring Motors sued Ford under theories of negligence, strict liability and breach of warranty. *Ibid.* The basic issue was whether the applicable statute of limitations was the four-year statute in the U.C.C., *N.J.S.A.* 12A:2-725, or the six-year statute of limitations pertaining to tort actions for property damage, *N.J.S.A.* 2A:14-1. We [**270] held that Spring Motors had a cause of action against both Ford and Clark for breach of warranty and that the U.C.C.'s four-year period of limitations determined the time for the commencement of the action.

[*632] [***24] When the harm suffered is to the product itself, unaccompanied by personal injury or property damage, we concluded that principles of contract, rather than of tort law, were better suited to resolve the purchaser's claim. *Id.* at 580, 489 A.2d 660. Consequently, we held that the U.C.C. provided the appropriate period of limitations. *Id.* at 561, 489 A.2d 660. Because the action was between commercial parties, we did not address the issue raised by *Santor,* whether a consumer could maintain an action for both breach of warranty and strict liability. *See id.* at 575, 489 A.2d 660.

One year after we decided *Spring Motors,* the United States Supreme Court reviewed the roles of tort and contract law in a case involving economic loss caused by the defective design and manufacture of turbines in supertankers. *See East River, supra,* 476 *U.S.* 858, 106 *S. Ct.* 2295, 90 *L. Ed.*2d 865. In a unanimous opinion, the Court began, "[i]n this admiralty case, we must decide whether a cause of action in tort is stated when a defective product purchased in a commercial transaction malfunctions, injuring only the product itself and causing purely economic loss." *Id.* at 859, 106 *S. Ct.* at 2296, 90 *L. Ed.* [***25] 2d 865. The Court continued, "charting a course between products liability and contract law, we must determine whether injury to a product itself is the kind of harm that should be protected by products liability or left entirely to the law of contracts." *Ibid.*

After analyzing relevant state court decisions, including *Santor, Seely,* and *Spring Motors,* the Court concluded "that a manufacturer in a commercial transaction has no duty under negligence or strict products-liability theory to prevent a product from injuring itself." *Id.* at 871, 106 *S. Ct.* at 2302, 90 *L. Ed.*2d 865. In an action for economic loss, the reasons for imposing a tort duty are weak while "those for leaving the party to its contractual remedies are strong." *Ibid.* For example, injury to a product itself neither implicates the safety concerns of tort law, *ibid.,* nor justifies "[t]he increased cost to the public that would result from holding the manufacturer liable in tort." *Id.* at 872, 106 *S. Ct.* at 2302, 90 *L. Ed.*2d 865. Allowing recovery for all foreseeable damages in claims seeking purely economic loss, could subject a manufacturer to liability for vast sums arising [***26] from the expectations of parties [*633] downstream in the chain of distribution. *Id.* at 874, 106 *S. Ct.* at 2304, 90 *L. Ed.*2d 865.

Subsequently, state and federal courts, when exercising admiralty jurisdiction, have recognized that *East River's* bar of strict-liability claims extends to actions brought by consumers. *See, e.g.*, *Karshan v. Mattituck Inlet Marina & Shipyard*, 785 *F. Supp.* 363, 365-66 (E.D.N.Y.1992) (finding purchaser of pleasure boat barred from recovering economic loss in tort because *East River* was not limited to commercial buyers); *Stanton v. Bayliner Marine Corp.*, 123 Wash. 2d 64, 866 *P.*2d 15, 23-24 (1993) (holding that matter involving consumer purchaser of allegedly defective pleasure boat was governed by maritime-product-liability rule, which denies recovery for economic loss, because weight of authority interpreting maritime rule has not made distinction between commercial and consumer transactions), *cert. denied,* 513 *U.S.* 819, 115 *S. Ct.* 78, 130 *L. Ed.*2d 32 (1994); *see also Lewinter, supra*, 32 *Cal. Rptr.*2d at 308-310 (affirming grant of summary judgment because admiralty jurisdiction applied to consumer purchaser [***27] of yacht who brought tort action seeking compensation for economic loss resulting from catastrophic hull failure); *but see Sherman v. Johnson & Towers Baltimore, Inc.*, 760 *F. Supp.* 499, 501-02 (D.Md.1990) (holding that *East River* did not apply to relationship between commercial party and consumer).

The vast majority of courts across the country likewise have concluded that purchasers of personal property, whether commercial entities or consumers, should be limited to recovery under contract principles. *See, e.g.*, *Arkwright-Boston Mfgs. Mutual Ins. Co. v. Westinghouse Elec. Corp.*, 844 *F.*2d 1174, 1178 (5th Cir.1988) (holding that Texas law did not permit recovery of economic loss resulting from damage to product itself); *Aloe Coal Co. v. Clark Equip. Co.*, 816 *F.*2d 110, 118 [**271] (3d Cir.1987) (holding that, under Pennsylvania law, fire damage to product itself was [*634] not recoverable from manufacturer on theory of negligence, but buyer's remedies limited to law of warranty); *Purvis v. Consolidated Energy Prods. Co.*, 674 *F.*2d 217, 222-23 (4th Cir. 1982) (finding that losses resulting from ineffective equipment were recoverable under law of contracts [***28] and not strict liability); *East Mississippi Power Assoc. v. Porcelain Prods. Co.*, 729 *F. Supp.* 512, 517-19 (S.D.Miss.1990) (holding that Mississippi law does not allow electric company to recover economic loss from manufacturer of defective insulation); *Public Serv. Co. v. Westinghouse Elec. Corp.*, 685 *F. Supp.* 1281, 1285 (D.N.H.1988) (holding that, under New Hampshire law, manufacturer of steam turbine electric generator could not be held strictly liable when allegedly defective product injured only itself); *Lucker Mfg., supra, 777 F. Supp.* at 415-17 (holding that, under Pennsylvania law, purchaser of defective steel components could not use tort theories to recover damages for purchase price, higher costs of completing project, and loss of goodwill, because these were in the nature of economic loss); *Wellcraft Marine v. Zarzour, 577 So.* 2d 414, 418 (Ala.1991) (finding that purchaser of defective motor boat could not recover under state products liability statute because damage was only to boat); *Florida Power & Light Co., supra, 510 So.* 2d at 902 (holding that buyer's claims for economic loss resulting from negligent design and [***29] manufacture of steam turbines were cognizable in contract but not tort); *Bay State-Spray & Provincetown S.S. v. Caterpillar Tractor Co.*, 404 Mass. 103, 533 *N.E.*2d 1350, 1351-53 (1989) (finding that action for lost profits and costs of repair concerning defective steamship engines was governed by U.C.C. statute of limitations rather than products liability limitations period); *Bocre Leasing, supra*, 621 *N.Y.S.*2d 497, 645 *N.E.*2d at 1199-1200 (holding that commercial purchaser of used helicopter, which crashed and caused injury only to itself, could not recover in negligence or strict tort liability for economic loss); *Cooperative Power Ass'n v. Westinghouse Elec. Corp.*, 493 *N.W.*2d 661, 665-66 (N.D.1992) (holding that manufacturer of machine sold in commercial transaction not liable in negligence or strict tort liability for economic loss when machine injures only itself); *Mid* [*635] *Continent Aircraft Corp. v. Curry County Spraying Serv., Inc.*, 572 *S.W.*2d 308, 312-13 (Tex.1978) (holding that parties were relegated to contractual remedies because damage to airplane was in nature of economic loss); *see also National Union Fire Ins. Co. v. Pratt & Whitney Canada, Inc.*, 107 Nev. 535, 815 [***30] *P.2d* 601, 603-05 (1991) (holding that economic loss not recoverable from engine manufacturer under tort theories of negligence and strict liability even though defective engine damaged entire aircraft and product caused calamitous crash).

Only a handful of jurisdictions have followed *Santor*. *See* White & Summers, *supra*, § 10-5 at 580 (criticizing *Santor* and stating "courts seem to have grown more willing in the last decade to label loss as economic, thus not recoverable in tort than before"); *see, e.g.*, *Sharon Steel Corp. v. Lakeshore, Inc.*, 753 *F.*2d 851, 855-56 (10th Cir.1985) (allowing plaintiff to recover damages for economic loss under New Mexico law when plaintiff was subjected to unreasonable risk of injury); *Cova v. Harley Davidson Motor Co.*, 26 Mich. App. 602, 182 *N.W.*2d 800, 804 (1970) (allowing owners of golf course to recover against manufacturer in strict liability for economic losses resulting from defect in golf carts); *City of La Crosse v. Schubert, Schroeder & Assoc.*, 72 Wis. 2d 38, 240 *N.W.*2d 124, 127 (1976) (holding that manufacturer of defective roofing materials may be liable for loss of value of roof under strict liability in tort); [***31] *see also Lloyd F. Smith Co. v. Den-Tal-Ez, Inc.*, 491 *N.W.*2d 11, 17 (Minn.1992) (holding that although U.C.C. provides the exclusive remedy in commercial transactions, consumer could still maintain tort actions for economic loss); *Livingston Bd. of Educ. v. United States Gypsum Co.*, 249 *N.J. Super.* 498, 504, 592 A.2d 653 (App.Div.1991) (holding that school board could bring strict-liability action for costs of asbestos removal because board was not a commercial purchaser and asbestos created grave personal safety risk).

Scholars likewise have criticized the extension of strict liability to include claims for purely economic loss. *See, e.g.,* White & [**272] Summers, *supra*, § 10-5; O'Donnell, Weiss & Kaplan, *On Differences* [*636] *Between Blood and Red Ink: A Second Look At The Policy Arguments For The Abrogation Of The Economic Loss Rule In Consumer Litigation,* 19 *Nova L. Rev.* 923, 926 (1995) (urging courts to prohibit strict-liability actions for pure economic injury, even when the potential plaintiff is not a commercial entity); Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective Product Cases,* 18 *Stan. L. Rev.* 974, 989-90 (1966) (criticizing courts [***32] as unaware of relevance of sales law to products-liability law); Feinman, *Doctrinal Classification and Economic Negligence,* 33 *SAN DIEGO L. Rev.* 137, 150 (1996) (stating that great majority of jurisdictions follow *Spring Motors* when commercial purchaser involved); Wade, *Tort Liability For Products Causing Physical Injury and Article 2 of the U.C.C.,* 48 *Mo. L. Rev.* 1, 26 n.87 (1983) (noting that substantial majority rule is that economic loss is not actionable in tort); Speidel, *Products Liability, Economic Loss and the U.C.C.,* 40 *Tenn. L. Rev.* 309, 316-18, 327 (1973) (pointing out that justification for imposing strict liability is less compelling where only commercial loss is suffered); *Manufacturers' Liability* note, *supra,* 114 *U. Pa. L. Rev.* at 548-49 (finding that U.C.C. remedies seem more appropriate than products liability law when damage is loss of benefit of bargain).

Following the majority rule, the American Law Institute's proposed *Restatement (Third) of Torts: Products Liability* § 21 (Proposed Final Draft April 1, 1997), defines "economic loss" to exclude recovery under tort theories for damage to a product itself. Section 21, comment d, states that "[w]hen a product defect [***33] results in harm to the product itself, the law governing commercial transactions sets forth a comprehensive scheme governing the rights of the buyer and seller." *Id.* at comment d. According to the Restatement, "*Santor* . . . appears today to stand alone in allowing a products liability action when a product did not create an unreasonable risk of harm but merely caused economic loss when it failed to meet performance expectations." *Id.* at Reporters' Note to Comment d.

[*637] Recently, several state courts have confined consumers to contract principles in actions for economic loss. In a case that involved a pleasure boat with a defective hull, the Alabama Supreme Court declined to recognize a tort action against the manufacturer when the boat took on water after striking a submerged object. *Wellcraft Marine, supra,* 577 *So.* 2d 414. The purchaser sued the manufacturer and others for breach of implied warranties and under the Alabama Extended Manufacturer's Liability Doctrine. In rejecting the latter claim, the Court said that the Doctrine did not apply when the damage was to the product itself. *Id.* at 418. Declining to distinguish between purchasers who were consumers [***34] or commercial buyers, the Court held that the "rule remains the same, regardless of the nature of the consumer." *Ibid.; see also* *Dairyland Ins. Co. v. General Motors Corp.,* 549 *So.* 2d 44, 46 (Ala.1989) (holding that consumer purchaser of defective van could not recover economic loss).

In *Casa Clara, supra,* 620 *So.* 2d 1244, the Florida Supreme Court rejected the contention of homeowners that they should be allowed to recover in tort for economic loss. Consequently, the Court held that the homeowners could not maintain a tort action to recover the costs of repair and lost value in their homes. *Id.* at 1247. The Court found that statutory remedies sufficed and that contract principles more appropriately addressed their claims for disappointed expectations. *Ibid.*; *see* *Florida Power & Light Co., supra,* 510 *So.* 2d at 902 (holding that commercial purchaser suffering economic loss was limited to contract remedies). Unlike with personal injuries, the "consuming public as a whole" should not "bear the cost of economic losses sustained by those who failed to bargain for adequate contract remedies." *Casa Clara, supra,* 620 *So.* 2d at 1247. [***35]

Likewise, in *Danforth, supra,* 608 *A.*2d 1194, the Delaware Supreme Court rejected the contention of homeowners that an individual consumer's unequal bargaining power warranted an exception to the economic loss rule. Accordingly, the Court upheld the dismissal of the homeowners' negligence claim. *Id.* at [*638] 1201. Writing for a unanimous court, Chief Justice Veasey reasoned that to [**273] allow an exception for individual consumers would defeat the legislative intent in enacting the U.C.C. "as the complete framework of the rights and remedies available to parties to a sale of goods contract." *Id.* at 1200-01.

Other jurisdictions also have rejected homeowners' reliance on tort law to recover economic loss arising out of construction defects. *See, e.g.,* *Oceanside, supra,* 659 *A.*2d at 270 (rejecting association's and individual homeowners' tort claims that sought recovery of economic loss caused by water damage around windows); *Morris v. Osmose Wood Preserving,* 99 Md. App. 646, 639 *A.*2d 147, 152 (1994) (rejecting homeowners' tort claims against plywood manufacturer for gradual deterioration of plywood in roofs because such damage constituted economic loss), [***36] *modified,* 340 Md. 519, 667 *A.*2d 624 (1995); *Lempke v. Dagenais,* 130 N.H. 782, 547 *A.*2d 290, 291 (1988) (rejecting property owners' tort claims for economic loss resulting from defective construction of garage); *Waggoner, supra,* 808 *P.*2d at 650, 653 (rejecting mobile home purchasers' tort actions against manufacturer for costs of repair and lost value resulting from defective roof design when damage was to only the mobile home itself, and holding that claim would be more properly made in warranty action). *Cf.* *Aronsohn v. Mandara,* 98 N.J. 92, 107, 484 A.2d 675 (1984) (declining "to decide the validity of plaintiff's negligence claim, since . . . the contractor's negligence would constitute a breach of the contractor's implied promise to construct the patio in a workmanlike manner").

An unresolved issue is whether the U.C.C. or tort law should apply when a defective product poses a serious risk to other property or persons, but has caused only economic loss to the product itself. In the present case, plaintiffs have not alleged that the defective seam in the boat posed such a risk. Hence, we do not resolve the issue.

In *East River,* the United States Supreme Court rejected cases [***37] that adopted intermediate positions, which attempted "to differentiate [*639] between 'the disappointed users . . . and the endangered ones'. . . and permit only the latter to sue in tort." 476 *U.S.* at 869-870, 106 *S. Ct.* at 2301, 90 *L. Ed.*2d 865 (quoting *Russell v. Ford Motor Co.,* 281 Or. 587, 575 *P.*2d 1383, 1387 (1978)). The Court stated:

> [T]he intermediate positions, which essentially turn on the degree of risk, are too indeterminate to enable manufacturers easily to structure their business behavior. Nor do we find persuasive a distinction that rests on the manner in which the product is injured. We realize that the damage may be qualitative, occurring through gradual deterioration or internal breakage. Or it may be calamitous. But

> either way, since by definition no person or other property is damaged, the resulting loss is purely economic. Even when the harm to the product itself occurs through an abrupt, accident-like event, the resulting loss due to repair costs, decreased value, and lost profits is essentially the failure of the purchaser to receive the benefit of its bargain--traditionally the core concern of contract law.
>
> [*Id.* at 871, 106 [***38] S.Ct. at 2301-02, 90 L. Ed.2d 865 (citations omitted).]

The *Restatement* implicitly adopts *East River,* but states "[a] plausible argument can be made that products that are dangerous in these respects [i.e. discovery of the defect prevented harm from occurring or the only harm was to the product itself, but not to persons or other property] rather than merely ineffectual, should be governed by the rules governing products liability law." *Restatement, supra,* at § 21, comment d.

As previously indicated, in this case we do not resolve the issue whether tort or contract law applies to a product that poses a risk of causing personal injuries or property damage but has caused only economic loss to the product itself. *See* *Spring Motors, supra,* 98 N.J. at 578, 489 A.2d 660 (distinguishing "cases involving claims for actual or potential personal injuries"). Similarly, we do not reach the issue of the preclusion of a strict-liability claim when the parties are of unequal bargaining power, the product is a necessity, no alternative source for the product is readily available, and the purchaser cannot reasonably insure against consequential damages.

[**274] In addition [***39] to the right to recover under the U.C.C., victims of fraud or unconscionable conduct possess substantial rights to recover for common-law fraud or for violations of various [*640] state and federal statutes. The U.C.C. expressly provides that "[u]nless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy or other validating or invalidating cause shall supplement its provisions." *See* *N.J.S.A.* 12A:1-103. The New Jersey Products Liability Law (the "Law") is to the same effect. *N.J.S.A.* 2A:58C-1 to -11. Although the Law excludes physical damage to the product itself from the definition of "harm," *N.J.S.A.* 2A:58C-1b(2), the Legislature did not intend to codify in the Law all common-law remedies, *see Senate Judiciary Committee Statement,* Senate, No. 2805, *L.* 1987, *c.* 197. Consequently, the exclusion of physical damage from harm that falls within the Law is not dispositive.

Additionally, the Legislature has adopted the Consumer Fraud Act, which provides generous protection to [***40] defrauded consumers. *N.J.S.A.* 56:8-1 to -20; *see, e.g.,* *Perth Amboy Iron Works v. American Home Assurance Co.,* 226 *N.J. Super.* 200, 226-27, 543 A.2d 1020 (App.Div.1988), *aff'd o.b.* 118 N.J. 249, 571 A.2d 294 (1990) , *Coastal Group v. Dryvit Sys.,* 274 *N.J. Super.* 171, 177-79, 643 A.2d 649 (App.Div.1994) (finding commercial party could bring Consumer Fraud Act claims).

In 1971, the New Jersey Legislature amended the Consumer Fraud Act to authorize a private cause of action by an injured party for a violation of the Act. *L.* 1971, *c.* 247 § 7, *codified at* *N.J.S.A.* 56:8-19. Included in the conduct prohibited by the Consumer Fraud Act is:

> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise. . . .
>
> [*N.J.S.A.* 56:8-2.]

[*641] Another statute, [***41] the Truth-In-Consumer Contract, Warranty and Notice Act (the "Act"), *N.J.S.A.* 56:12-1 to -18, protects consumers by requiring that consumer contracts be clearly written and understandable. For example, if a seller violates the Act and "the violation caused the consumer to be substantially confused about the rights, obligations or remedies of the contract," the seller is liable to the consumer for actual damages, punitive damages up to $ 50, and reasonable attorney fees not to exceed $ 2,500. *N.J.S.A.* 56:12-3. A court, moreover, may reform a consumer contract if a notice provision of the contract violates the Act and the violation substantially confused and caused financial detriment to the consumer. *N.J.S.A.* 56:12-4.1. The Act further prohibits limitations on warranties that "violate[] any clearly established legal right of the consumer or responsibility of a seller." *N.J.S.A.* 56:12-15. An aggrieved consumer may seek a

civil penalty of not less than $ 100, actual damages, or both, together with attorneys fees and court costs. *N.J.S.A.* 56:12-17.

Congress has provided further protection for consumers. For example, the Magnuson-Moss Warranty Act authorizes a suit [***42] for damages for breach of implied warranties, including "an implied warranty arising under state law . . . in connection with the sale by a supplier of a consumer product." 15 *U.S.C.A.* § 2301(7). Thus, it offers consumers a basis in federal law for recovering damages. 15 *U.S.C.A.* § 2301(d). A consumer may bring an action against a "supplier, warrantor, or service contractor" on any "written guarantee, implied warranty or service contract." Dreier, Goldman & Katz, *New Jersey Products Liability & Toxic Torts Law* 689 (1996 ed.). This Act also limits the types of disclaimers that sellers and others may place on warranties. 15 *U.S.C.A.* § 2308.

[**275] In sum, judicial decisions and statutory enactments, including the U.C.C., protect consumers from overreaching. Against this background, a tort cause of action for economic loss duplicating the one provided by the U.C.C. is superfluous and counterproductive.

[*642] III.

Here, plaintiffs seek the lost value on trade-in and the costs of repairing the boat under theories of negligence and strict liability. Thus, this action raises the question whether a consumer and his insurer can maintain an action in tort for economic loss only.

[***43] Alloway insured against the risk that gave rise to his economic loss. In a sense, the question becomes whether the better risk bearer is his insurer, New Hampshire, or GMI, the purchaser of the assets of the bankrupt boat manufacturer. To impose liability on GMI is to impose on it, in addition to the price it paid for Glasstream's assets in the bankruptcy proceeding, the added cost of the loss of a boat that it never owned. The imposition of that cost would dislocate the allocation of responsibility in the U.C.C. and impose the cost of an uncertain liability on one that did not agree to assume that cost. Alloway, on the other hand, relied not on any warranty or other contractual undertaking from GMI, but on the warranties issued by the boat dealer, Mullica, and the New Hampshire policy. Under both the warranties and the insurance policy, Alloway has been reimbursed.

By providing for express and implied warranties, [***44] that U.C.C. amply protects all buyers--commercial purchasers and consumers alike--from economic loss arising out of the purchase of a defective product. In addition, many buyers insure against the risk of the purchase of defective goods either directly through the purchase of an insurance policy, such as Alloway's purchase of the New Hampshire policy, or through insurance provided indirectly through many credit card purchases. Under the U.C.C. as construed by this Court, moreover, the absence of privity no longer bars a buyer from reaching through the chain of distribution to the manufacturer. *See* *Spring Motors*, supra, 98 N.J. at [*643] 582, 586-87, 489 A.2d 660; *Santor, supra*, 44 N.J. at 63, 207 A.2d 305. In addition, the United States Supreme Court, the overwhelming majority of state courts, and legal scholars have recognized the unfairness of imposing on a seller tort liability for economic loss. Accordingly, we hold that plaintiffs' tort claims are barred.

Before this Court, GMI argues primarily, as it has in the lower courts, that it is not liable to plaintiffs in tort. Alternatively, GMI argues for the first time that admiralty law, not state law, should determine this case. In view [***45] of our finding that GMI is not liable in tort for plaintiffs' economic loss under New Jersey law, we need not reach GMI's belated argument. *Cf.* *Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234, 300 A.2d 142 (1973) (finding that "[i]t is a well-settled principle that our Appellate Courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available" unless the matter involves the trial court's jurisdiction or is of public importance); *see also* *Maisonet v. Department of Human Services, Div. of Family Dev.*, 140 N.J. 214, 222-23, 657 A.2d 1209 (1995) (holding that courts not required by Supremacy Clause to exercise original jurisdiction over civil-rights claim when asserted for first time on appeal); *R.* 2:10-5 (indicating that exercise of original jurisdiction is discretionary). Similarly, we need not reach the additional issues concerning GMI's liability as Glasstream's successor or the effect on GMI of the purchase in bankruptcy of Glasstream's assets free and clear of all claims.

The judgment of the Appellate Division is reversed, and the judgment of the Law Division dismissing the complaint is reinstated.

[***46] CHIEF JUSTICE PORITZ and JUSTICES O'HERN, GARIBALDI and COLEMAN join in JUSTICE POLLOCK's opinion. JUSTICE HANDLER filed a separate concurring opinion in which JUSTICE STEIN joins.

CONCUR BY: HANDLER

CONCUR

HANDLER, J., concurring.

In this case, the Court holds that a consumer, who has purchased a product, cannot rely on a common-law cause of action sounding in strict-products liability and negligence to recover damages solely for the economic loss resulting from a defect that [*644] destroys [**276] the worth of the product. Instead, the majority determines that the consumer's exclusive remedy consists of the express warranties contained in the Uniform Commercial Code ("U.C.C."). I am not troubled with that disposition because I am convinced that in a case such as this, the consumer is not at a genuine commercial disadvantage and is the kind of consumer who falls within the ambit of the U.C.C. The consumer here is a purchaser of an expensive luxury boat whose bargaining power is substantially equivalent to that of the seller. Furthermore, because the majority has not foreclosed tort recovery for purely economic loss in instances where the parties may be economic captives with unequal bargaining [***47] power, I am able to join in the result. *See Ante* at 638-639, 695 A.2d at 272-273 ("[W]e do not reach the issue of the preclusion of a strict-liability claim when the parties of unequal bargaining power, the product is a necessity, no alternative source for the product is readily available, and the purchaser cannot reasonably insure against consequential damages.").

In *Spring Motors Distributors v. Ford Motor Co.*, 98 N.J. 555, 596-97, 489 A.2d 660 (1985) (Handler, J., concurring), I expressed the view that the U.C.C. did not foreclose a tort remedy for economic loss incurred by a non-commercial consumer. That category of consumer, as I viewed it, encompassed a class of purchasers who frequently would not have equal bargaining power. I believed that comparative bargaining power was the most critical factor in determining whether the U.C.C. was the exclusive remedy and that the U.C.C. did not bar other avenues of relief to consumers with substantial bargaining disadvantages. Under the U.C.C., recovery is restricted to limited claimants who meet the stringent requirements of the U.C.C. warranty provisions. Moreover, warranty disclaimers often bar recovery altogether. [1] Such a [*645] result is acceptable [***48] only where the parties to the contract have equivalent bargaining power and meaningful alternatives. *See Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C.Cir.1965) ("[W]hen a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent . . . was ever given to all the terms.")

1 The majority is satisfied with the limited U.C.C. remedy because "[a]lthough a manufacturer may be in a better position to absorb the risk of loss from physical injury or property damage, a purchaser may be better situated to absorb the 'risk of economic loss caused by the purchase of a defective product.'" *Ante* at 628, 695 A.2d at 268 (citations omitted). That is not always the case. One can imagine myriad instances where the purchaser of an expensive necessity, such as a refrigerator or an oven, could be devastated by the product's defectiveness.

Comparative bargaining power cannot be determined [***49] merely by labeling a consumer either "commercial" or "non-commercial." As the facts of this case reveal, some non-commercial purchasers will enjoy equal bargaining power. Similarly, some commercial purchasers in no sense enjoy equal bargaining power or the opportunity to secure adequate protections in the bargaining process. *See Spring Motors, supra*, 98 N.J. at 592, 489 A.2d 660 (Handler, J., concurring) ("It would not be correct to consider the U.C.C. remedy to be exclusively applicable to a purchaser's claim simply because the transaction can be viewed as 'commercial' . . . or because the ultimate purchaser is in business. . . . [T]he ultimate purchaser of a vehicle could be a travelling salesperson or a small-scale trucker, or a carpenter, plumber, electrician, or landscape gardener.") Whether the U.C.C. should be the exclusive remedy for economic loss in a particular case can be determined only by consideration of all the circumstances surrounding the transaction. In many cases, a gross inequality of bargaining power will supplant the exclusivity of the U.C.C. remedy.

In sum, I am confident that the Court's decision does not preclude tort remedies for economic loss in such circumstances. [***50] I thus concur in its judgment.

Justice STEIN joins in this opinion.

HANDLER and STEIN, JJ., concur in result.

LEXSEE

AMERICAN BUMPER & MANUFACTURING COMPANY, Plaintiff-Appellant, v TRANSTECHNOLOGY CORPORATION and TRW, INC., Defendants-Appellees.

No. 229616

COURT OF APPEALS OF MICHIGAN

252 Mich. App. 340; 652 N.W.2d 252; 2002 Mich. App. LEXIS 1119; 48 U.C.C. Rep. Serv. 2d (Callaghan) 607

June 4, 2002, Submitted
July 26, 2002, Decided

PRIOR HISTORY: [***1] Ionia Circuit Court. LC No. 97-018491-CK.

DISPOSITION: Affirmed.

COUNSEL: Miller, Canfield, Paddock and Stone, P.L.C. (by Leland D. Barringer), for the plaintiff. Detroit.

Warner Norcross & Judd LLP (by Wallson G. Knack and John J. Bursch), for the defendants. Grand Rapids.

JUDGES: Before: Jansen, P.J., and Smolenski and Wilder, JJ.

OPINION BY: Kathleen Jansen

OPINION

[**253] [*341] PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendants under MCR 2.116(C)(10). We affirm.

In April 1989, plaintiff entered into an agreement with the Ford Motor Company to manufacture the front bumpers for Ford F-series pickup trucks. According to plaintiff's complaint, at all times Ford controlled the material specifications, processes, checking procedures, and finishes for the fasteners used in manufacturing the bumpers. Ford provided a list of approved sub-suppliers to plaintiff, which included defendants. From the suppliers of fasteners approved by Ford, plaintiff requested quotes for U-nuts that plaintiff would use to fasten the bumpers to the Ford bumper assemblies. In November 1990, the Palnut Company (first a division of defendant TRW, Inc., and later a division of defendant TransTechnology Corporation) responded to plaintiff's request by issuing a quotation for its U-nuts. [***2] In February 1991, plaintiff submitted a "blanket" purchase [*342] order, which allowed plaintiff to fill its need for U-nuts over the course of its contract with Ford.

[**254] From 1991 to 1993, Palnut provided plaintiff with many U-nuts used in the bumper assemblies for Ford's F-series pickup trucks. The U-nuts that were initially supplied to plaintiff had a phosphate-based coating. In 1992, in response to Ford's requirements, Palnut changed the coating on the U-nuts to a zinc organic-based coating called Dorroflake. Late in 1992, plaintiff expressed concerns about Palnut's slow delivery performance. In response, a Palnut employee suggested changing the fastener coating to Dacromet because that coating could be done in house. Dacromet is a zinc water-based coating manufactured by Metal Coatings International. Palnut sent samples of the Dacromet-coated U-nuts to plaintiff and in April 1993, plaintiff notified Palnut that the Dacromet-coated U-nuts were approved by its quality assurance department. Ford also approved Dacromet as a coating and in August 1993, Ford required that only Dacromet be used as a coating on the U-nuts and that Dorroflake was no longer an approved coating.

In late November [***3] 1993, Ford received reports from its dealers that the U-nuts were failing, causing the bumpers to become loose or fall off the trucks. Ford relayed this information to plaintiff on November 28, 1993. Plaintiff then notified Palnut of the U-nut failure and on December 6, 1993, plaintiff canceled its contract with Palnut. In February 1994, Ford initiated a recall campaign to replace the defective U-nuts, an endeavor that cost Ford more than $ 9 million.

On February 25, 1994, Ford issued a report, purportedly identifying what it believed to be the causes of the failure of the U-nuts. Ford believed that plaintiff [*343] and Palnut were at fault and that plaintiff should bear the financial responsibility because it was the end item supplier. Plaintiff and Palnut conducted independent investigations regarding why the U-nuts were failing. Ultimately, it was found that the cause of the failure was stress corrosion cracking. The U-nuts, which are made of high-strength steel, would crack or corrode when the zinc coating was exposed to a salt water environment (such as when roads are salted in the winter) and when the U-nuts are stressed (by inserting and tightening a bolt). One of the experts stated [***4] that it is "bad engineering" to put zinc on high-strength steel and that this was the cause of the U-nut failure.

In June 1994, plaintiff presented its response to Ford's report. In the response, plaintiff carefully dismissed each charge against it and Palnut and instead concluded that the root cause of the failure of the U-nuts was associated with the change to Dacromet from Dorroflake. Plaintiff clearly stated that the fault was with Ford and Metal Coatings International because Ford directed Palnut and all the approved fastener suppliers to change to Dacromet, but neither Ford nor Metal Coatings International had properly tested Dacromet when Ford directed this change.

Nothing more happened between plaintiff and Palnut until plaintiff filed suit against defendants in August 1997. In the meantime, in 1995, Ford and plaintiff entered into settlement negotiations and an agreement was reached in May 1995. Plaintiff had initially paid $ 900,000 to Ford as part of the recall campaign, and also agreed to a one-time price reduction of $ 2.2 million. Palnut was not aware of or involved in the settlement negotiations.

[*344] Plaintiff's amended complaint alleges breach of express warranty, breach [***5] of implied warranties of fitness and merchantability, express indemnification, and implied indemnification. Defendants moved for summary disposition, arguing that plaintiff failed to comply with the notice provision of MCL 440.2607(3)(a) of the Uniform [**255] Commercial Code, MCL 440.2607(3)(a), requiring a buyer to notify a seller of a breach of contract within a reasonable time of discovering the breach, and that plaintiff was barred from any remedy. Defendants also argued that the breach of express warranty and express indemnification claims should be dismissed because the language in plaintiff's purchase orders that supported those claims never became part of the parties' contract. Finally, defendants argued that the implied indemnification claim should be dismissed because defendants were not given notice of, or an opportunity to participate in, the settlement negotiations between plaintiff and Ford. The trial court agreed and granted summary disposition under MCR 2.116(C)(10) in defendants' favor "for the reasons set forth in the defendant[s'] brief and for the arguments made in court today."

The trial court's ruling on a motion for summary disposition under MCR 2.116(C)(10), [***6] which tests the factual sufficiency of the complaint, is reviewed de novo. *Maiden v Rozwood,* 461 Mich. 109, 118; 120; 597 N.W.2d 817, (1999). The court is to consider the pleadings, affidavits, admissions, depositions, and other documentary evidence submitted by the parties in a light most favorable to the party opposing the motion. *Id.* 461 Mich. at 120. If the proffered evidence fails to establish a [*345] genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Id.*

This case involves application of the Uniform Commercial Code, MCL 440.1101 *et seq.* Specifically, the trial court ruled that plaintiff had failed to give notice of breach of the contract to Palnut and, therefore, was barred from any remedy. *MCL 440.2607(3)(a)* provides:

(3) Where a tender has been accepted

(a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy[.]

The burden of establishing a breach is on the buyer. *MCL 440.2607(4)* . The parties disagree regarding whether there [***7] is a "strict" or "lenient" standard in Michigan relative to the adequacy of notice. Comment four to *MCL 440.2607* states that the "content of the notification need merely be sufficient to let the seller know that the transaction is still troublesome and must be watched." This sentence has been used to justify a lenient standard. Comment four, however, further states that "the notification which saves the buyer's rights . . . need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation." This sentence has been used to justify the strict standard.

Regardless of whether a strict or lenient standard is applied, we find that the notice was not adequate in this case because the notice did not satisfy the policies underlying the UCC's notice provision and plaintiff's conduct did not satisfy the UCC's standard of commercial good faith. See *Aqualon Co v MAC* [*346] *Equipment, Inc,* 149 F.3d 262, 268-269 (CA 4, 1998); *Northern States Power Co v ITT Meyer Industries,* 777 F.2d 405, 408, n.3 (CA 8, 1985); *Eastern Airlines, Inc v McDonnell Douglas Corp,* 532 F.2d 957, 976 (CA 5, 1976). [***8] Here, the undisputed facts are that Ford notified plaintiff in late November 1993 of the problems that Ford was experiencing with the U-nuts. Immediately thereafter, plaintiff informed Palnut that Ford was experiencing problems with the U-nuts. About one week later, plaintiff recommended, and Ford agreed, to change the fastener supplier from Palnut to California Industrial Products. On December 6, [**256] 1993, plaintiff notified Palnut that it would no longer purchase U-nuts from Palnut. Ford, plaintiff, and Palnut then began to investigate the problem to determine why the U-nuts were failing. Ford's report was issued in February 1994. Ford assigned blame to plaintiff and Palnut, but believed that plaintiff should be assigned financial responsibility because it was the end item supplier. In June 1994, plaintiff responded to Ford's conclusions with its own report exonerating itself and Palnut from responsibility for the failure of the U-nuts. Plaintiff's report clearly assigned blame to Ford and Metal Coatings International. From March to May of 1995, Ford and plaintiff entered into settlement negotiations where plaintiff agreed to a settlement of $ 3.1 million and future price [***9] reductions to Ford totaling about $ 8 million. Palnut was not involved in any way in the settlement negotiations. It was not until August 1997 that plaintiff filed suit against defendants.

The purposes of the UCC's notice requirement are (1) to prevent surprise and allow the seller the opportunity to make recommendations how to cure the [*347] nonconformance, (2) to allow the seller the fair opportunity to investigate and prepare for litigation, (3) to open the way for settlement of claims through negotiation, and (4) to protect the seller from stale claims and provide certainty in contractual arrangements. *Aqualon, supra* 149 F.3d at 269, citing 1 White & Summers, Uniform Commercial Code (4th ed), § 11-10, pp 612-613. Here, rather than allowing Palnut to attempt to cure the defect, plaintiff recommended purchasing the U-nuts from another manufacturer and simply canceled the contract. Once the parties investigated the problem with the U-nuts, plaintiff determined that Palnut was not at fault. Further, there was no overture of negotiation or settlement between plaintiff and Palnut. Indeed, there is no evidence that plaintiff ever considered Palnut to be in breach after the June 1994 [***10] report was presented to Ford. Ultimately, plaintiff did not bring suit against defendants until more than 3 1/2 years after the defect with the U-nuts was first discovered.

We find that plaintiff has not presented a genuine issue of material fact that would preclude summary disposition for defendants. In this case, plaintiff did nothing more that initially notify defendants that there was a problem with the U-nuts, and never notified defendants that they were in breach. Some courts have made clear that it is not enough for the buyer to only notify the seller that it is having difficulty with the goods. *Aqualon, supra* 149 F.3d at 266-267; *K & M Joint Venture v Smith Int'l, Inc*, 669 F.2d 1106, 1113 (CA 6, 1982). Clearly, plaintiff's conduct after the problem with the U-nuts was discovered is completely contrary to a finding that plaintiff considered defendants to be in breach because plaintiff's own investigation [*348] exonerated defendants from fault. *Eastern Airlines, supra* 532 F.2d at 978 (even if adequate notice is given at some point, subsequent actions by the buyer may negate its effect and the buyer's conduct, taken as a whole, must constitute timely notification [***11] that the transaction is claimed to involve a breach). The purposes of the notice requirement were not served in this case; therefore, MCL 440.2607(3)(a) bars plaintiff from any remedy.

To the extent that plaintiff argues that the "any remedy" language applies only to any remedy under the UCC and does not include its claims of express and implied indemnification, we disagree. MCL 440.1201(34) broadly defines "remedy" as "any remedial right to which an aggrieved party is entitled with or without resort to a tribunal." Further, MCL 440.2607(3)(a) also clearly states that if [**257] notice of the breach is not given within a reasonable time, the buyer is "barred from any remedy." It does not state "any remedy under the UCC" as plaintiff contends. Here, the statute plainly and unambiguously states that notice must be given or the buyer is barred from *any* remedy. Further, the indemnification claims here should be included as "any remedy" where the indemnification claims are based on the underlying breach of warranty claims for which the buyer also seeks a remedy.

Accordingly, the trial court did not err in granting summary [***12] disposition in favor of defendants under MCR 2.116(C)(10) because plaintiff failed to give adequate notice under MCL 440.2607(3)(a) for the alleged breach, thus barring plaintiff from pursuing any remedy.

Affirmed.

/s/ Kathleen Jansen

/s/ Michael R. Smolenski

/s/ Kurtis T. Wilder

LEXSEE

KATHRYN S. BARNHILL, Plaintiff, vs. IOWA DISTRICT COURT FOR POLK COUNTY, Defendant.

No. 7-573 / 06-0163

COURT OF APPEALS OF IOWA

2007 Iowa App. LEXIS 1134

October 24, 2007, Filed

NOTICE:

NO DECISION HAS BEEN MADE ON PUBLICATION OF THIS OPINION. THE OPINION IS SUBJECT TO MODIFICATION OR CORRECTION BY THE COURT AND IS NOT FINAL UNIL THE TIME FOR REHEARING OR FURTHER REVIEW HAS PASSED. AN UNPUBLISHED OPINION MAY BE CITED IN A BRIEF; HOWEVER, UNPUBLISHED OPINIONS SHALL NOT CONSTITUTE CONTROLLING LEGAL AUTHORITY.

SUBSEQUENT HISTORY: Reported at Barnhill v. Iowa Dist. Court for Polk County, 742 N.W.2d 605, 2007 Iowa App. LEXIS 1884 (Iowa Ct. App., Oct. 24, 2007)

PRIOR HISTORY: [*1]
Appeal from the Iowa District Court for Polk County, Douglas Staskal, Judge. Kathryn Barnhill appeals the district court's ruling that she violated Iowa Rule of Civil Procedure 1.413 and sanction of $ 25,000 to pay toward the opposing party's attorney fees.
Jerry's Homes, Inc. v. Tamko Roofing Prods., 40 Fed. Appx. 326, 2002 U.S. App. LEXIS 13582 (8th Cir. Iowa, 2002)

DISPOSITION: AFFIRMED.

COUNSEL: Kathryn Barnhill of Barnhill & Associates, P.C., West Des Moines, Pro se.

Wade Hauser III of Ahlers & Conney, P.C., Des Moines, and J. Stan Sexton, Kansas City, Missouri, for defendant.

JUDGES: Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ. MAHAN, P.J. VAITHESWARAN, J. (dissenting)

OPINION BY: MAHAN

OPINION

MAHAN, P.J.

Kathryn Barnhill appeals the district court's ruling that she violated Iowa Rule of Civil Procedure 1.413 and sanction of $ 25,000 to pay toward the opposing party's attorney fees. We affirm.

I. Background Facts and Proceedings

An understanding of the procedural history of this case is essential to ruling on the issues presented to this court. As the district court notes, "This case has a long and complex procedural history. The court file now comprises twenty-one volumes." Specific facts relevant to the merits of this appeal will be stated in the analysis of this case where appropriate.

The original controversy arose from allegations [*2] that Tamko Roofing Products, Inc. (Tamko) manufactured and sold defective roofing shingles which were installed on plaintiffs' homes or structures by plaintiff Jerry's Homes, Inc. (Jerry's Homes). In 1998 Jerry's Homes, represented by Barnhill, filed suit against Tamko in state court. The purpose of the lawsuit was to either compel Tamko to repair the roofs on over 400 houses built by Jerry's Homes or, in the alternative, recover sufficient damages for Jerry's Homes to make the repairs itself. Jerry's Homes asserted that Tamko promised it would repair the damages to the shingles when problems first arose with the quality of the shingles. The case was removed to federal court based on diversity. Most of the claims were dismissed on summary judgment, including the claims for breach of express and implied warranty and fraud. A jury returned a verdict in favor of Jerry's Homes for just over $ 1 million, but the federal magistrate judge granted Tamko's post-trial motion to vacate the verdict. The magistrate's ruling was affirmed on appeal to the Eighth Circuit Court of Appeals. *Jerry's Homes, Inc. v. Tamko Roofing Prods., Inc.*, 40 F. App'x 326 (8th Cir. 2002).

In March 2001 Barnhill filed [*3] a class action lawsuit in state court against Tamko and David Humphreys, Tamko's president and CEO. The class consisted of persons who had either directly or indirectly purchased the allegedly defective shingles through Jerry's Homes. The class also included Jerry's Homes, itself, as a representative plaintiff. After its fourth and final amendment, the petition made allegations against Tamko and Humphreys of (1) breach of express warranty, (2) breach of implied warranty, (3) fraudulent misrepresentation, (4) negligent misrepresentation, (5) rescission due to impermissible liquidated damages, (6) rescission due to unconscionability of express warranty, and (7) violation of a Missouri statute prohibiting unfair business practices. The petition asserted that Humphreys "at all times relevant hereto directed and controlled the actions of [Tamko] with respect to the allegations herein." For the most part, the allegations made no distinction between Tamko and Humphreys.

Discovery was conducted throughout 2001. In late 2001 and early 2002, plaintiffs filed a motion for class certification, and defendants filed motions for summary judgment on every allegation of plaintiffs' petition. Despite [*4] defendants' urging during a status conference with the court that the summary judgment motions be resolved before the class certification motion, the district court scheduled the class certification motion for hearing. After the hearing, the court certified the case as a class action against both defendants. Defendants made an interlocutory appeal to the Iowa Supreme Court that ordered the district court to rule on the pending motions for summary judgment. Judge Rosenberg then dismissed six of the seven counts against Humphreys and a substantial part of the case against Tamko. In particular, he dismissed the claims of Jerry's Homes and another plaintiff on the ground that they were res judicata as a result of the federal lawsuit. This left only the fraudulent misrepresentation claim pending against Humphreys. On appeal, our court of appeals affirmed the dismissal of the six claims against Humphreys and reversed the district court's failure to grant summary judgment on the final claim of fraudulent misrepresentation. *Sharp v. Tamko Roofing Prods., Inc.*, No. 02-0728, 2004 Iowa App. LEXIS 1250 (Iowa Ct. App. Nov. 15, 2004). Judge Staskal subsequently granted summary judgment in favor of Tamko on the two remaining [*5] issues. We affirmed his dismissal of these claims. *Sharp v. Tamko Roofing Prods., Inc.*, No. 05-1372, 2006 Iowa App. LEXIS 1120 (Iowa Ct. App. Oct. 11, 2006). At the end of more than five years of litigation, every allegation was finally dismissed on summary judgment.

Amidst these appeals, Humphreys filed a motion for sanctions against all named plaintiffs and their attorney, Barnhill, pursuant to Iowa Code section 619.19 and Iowa Rule of Civil Procedure 1.413(1) asserting:

> None of the claims pursued by plaintiffs in this case against Humphreys were well grounded in fact or warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law. For example and without limitation, Ms. Barnhill has signed pleadings and motions while pursuing claims against Humphreys for breach of contract and breach of contract-related causes of action notwithstanding the fact that no contract between Humphreys and plaintiffs ever existed. Therefore, it appears plaintiff's claims against Humphreys were interposed for improper purposes of harassing Humphreys and causing needless and wrongful costs of litigation.

After Humphreys filed a brief in support of his motion for sanctions, Barnhill [*6] filed an original and amended resistance to the motion and a reply brief. On September 7, 2005, Judge Staskal declined to enter sanctions against the plaintiffs, but found that Barnhill had violated Iowa Rule of Civil Procedure 1.413. Specifically, he stated:

> The major exception to the rule of independent corporate identity is the doctrine of 'piercing the corporate veil.' The doctrine is not at issue here. Barnhill does not claim that there was ever any basis in fact or law for ignoring Tamko's separate corporate existence. Rather, the sole basis upon which she seeks to justify all of the claims asserted against Humphreys is that corporate officers are personally liable for the torts they commit even if they are acting on behalf of their corporation. The very serious problem with this argument at the outset is that only two of the five claims asserted in the original Petition, and of the seven claims asserted in the Petition as finally amended, are tort claims. . . . Barnhill makes no attempt to explain the factual or

legal bases for asserting the rescission claim that was asserted against Humphreys in the original Petition or the two rescission claims that were asserted against him [*7] in the Petition as finally amended. It is obvious that claims for rescission of a contract are contract, not tort, claims. It is a violation of Rule 1.413 for an attorney, without explanation, to assert a breach of contract claim against a corporate officer where only the corporation is a party to the contract. Therefore, Barnhill violated Rule 1.413 by asserting contract rescission claims against Humphreys.

. . . .

[T]he manner in which this [fraudulent misrepresentation] claim was pled against Humphreys violated Rule 1.413 because Barnhill pled facts that were literally untrue, as follows:

> 61. Defendant Tamko **and Defendant Humphreys** made express representations to Plaintiffs and the classes they represent.
>
> 63. Defendant Tamko **and Defendant Humphreys made these express representations in various media both in writing and by oral sales presentations** when in fact they did not have a reasonable basis for making those representations.

Supplemented Fourth Amended Class Action Petition. (emphasis added). The allegations in paragraph 61 are not true as they pertain to Humphreys because he had no contact with any of the Plaintiffs except for an alleged conversation with an officer of Jerry's [*8] Homes in 1995. Further, even if a corporate officer is liable for torts he personally commits, that does not make all of the corporation's acts the acts of that officer. While it would have been acceptable for Barnhill to allege that Humphreys was responsible for the alleged misrepresentations, it is not acceptable, in the court's view, to allege that Humphreys *made* the representations in the warranties and other literature.

However, there is a more egregious violation of Rule 1.413 in the assertion of this claim at all. One of the fundamental elements of a misrepresentation claim is that the injured party relied on the alleged misrepresentation. Thus, in the Petition, Barnhill alleges:

> 74. Plaintiffs acted in reliance on the truth of the representations and were justified in relying on the representations.

Supplemented Fourth Amended Class Action Petition. At least the majority, if not virtually all, of the Plaintiffs in this case, other than Jerry's Homes, did not themselves purchase Tamko shingles and, therefore, could not possibly have relied on any representations from anyone in deciding to purchase the shingles.

. . . .

In summary, Barnhill asserted a claim of reliance on behalf [*9] of a class of persons, the vast majority of whom undoubtedly had no involvement whatsoever in choosing Tamko shingles and who therefore could not possibly have relied on any representations in deciding to purchase them. Moreover, when challenged in the district court to specifically show evidence of a Plaintiff who did rely on Tamko representations, she made false statements about the evidence of reliance by the two Plaintiffs she chose.

In regards to the negligent misrepresentation claim the district court found:

> [T]he law is clear that a claim of negligent misrepresentation applies only to persons who are in the business of supplying information. . . . It does not apply to product sellers who supply information about the product in

> connection with its sale. . . . Even if the [rule] did not apply to those who are "distributors and other suppliers" of the Tamko shingles, those persons, with the exception of Jerry's Homes, are not Plaintiffs. It is hardly a defense to asserting a frivolous claim against particular defendants to argue that the claim should legitimately be asserted against someone else.
>
> [E]ven if [Humphreys] is personally guilty of making a negligent misrepresentation, [*10] he is not personally in the business of selling shingles or of selling information regarding the shingles.
>
> Finally, one of the elements of this claim, like the fraudulent misrepresentation claim, is that the Plaintiffs relied on the information. Making that assertion violates Rule 1.413 for reasons already discussed above.

Regarding the claim of violation of the Missouri statute, the district court stated:

> Before asserting this claim specifically created by a state statute, a reasonably competent attorney would stop to consider whether the statute contained any jurisdictional or venue requirements. A reasonably competent attorney would then discover what the court of appeals pointed out-that the statute itself requires actions under it to be brought in Missouri. Therefore, Barnhill's assertion of this claim violated Rule 1.413.

After Judge Staskal ruled that Barnhill violated rule 1.413, Barnhill filed a response to his ruling. Her brief to this court is verbatim of her response to Judge Skaskal's ruling with the exception of one additional page. In his order imposing sanctions, Judge Skaskal considered and rejected her arguments, interpreting them as a motion to reconsider. In his [*11] order, Judge Staskal stated:

> In summary, the pleadings and other documents filed by Barnhill in this case have in general such a confusing, convoluted, self-contradictory and elusively vague, ambiguous, indirect and constantly shifting quality as to compel the conclusion that the case was made up as it went along. It is as though Barnhill said whatever needed to be said at each step to just get past the moment, whether there was a legitimate basis for saying it or not. In the process, Barnhill has violated Rule 1.413(1).

He then sanctioned Barnhill and ordered her to pay Humphreys $ 25,000 of the nearly $ 150,000 he had incurred in attorney's fees defending the case. Barnhill appeals.

II. Standard of Review

We review a decision on imposing sanctions for an abuse of discretion. *Mathias v. Glandon*, 448 N.W.2d 443, 445 (Iowa 1989). The proper means to review a trial court's order imposing sanctions is by writ of certiorari. *Id.* Certiorari is a procedure to test whether a lower board, tribunal, or court exceeded its proper jurisdiction or otherwise acted illegally. Iowa R. Civ. P. 1.1401; *Backstorm v. Iowa Dist. Court*, 508 N.W.2d 705, 707 (Iowa 1993), *cert denied,* 511 U.S. 1042, 114 S. Ct. 1566, 128 L. Ed. 2d 211 (1994). "Relief [*12] through certiorari is strictly limited to questions of jurisdiction or illegality of the challenged acts." *French v. Iowa Dist. Ct.*, 546 N.W.2d 911, 913 (Iowa 1996). Although our review is for an abuse of discretion, we will correct erroneous application of the law. *Weigel v. Weigel*, 467 N.W.2d 277, 280 (Iowa 1991). The district court's findings of fact, however, are binding on us if supported by substantial evidence. *Zimmermann v. Iowa Dist. Ct.*, 480 N.W.2d 70, 74 (Iowa 1992).

An abuse of discretion occurs when the district court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Schettler v. Iowa Dist. Ct.*, 509 N.W.2d 459, 464 (Iowa 1993). A ground is unreasonable if it is not based on substantial evidence. *Id.* at 464-65. We are only permitted to sustain the proceedings below, annul the proceedings wholly or in part, or prescribe the manner in which either party may proceed. *Harris v. Iowa Dist. Ct.*, 570 N.W.2d 772, 776 (Iowa Ct. App. 1997). We may not substitute an amended order for that of the district court. *Id.*

III. Merits

The district court found that Barnhill violated Iowa Code section 619.19 (2005) and Iowa Rule of Civil Procedure 1.413(1). [*13] The statute and rule are identical in substance. Iowa Code section 619.19 reads as follows:

> The signature of a party, the party's legal counsel, or any other person representing the party, to a motion, pleading, or other paper is a certificate that:
>
> 1. The person has read the motion, pleading or other paper.
>
> 2. To the best of the person's knowledge, information, and belief, formed after reasonable inquiry, it is grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.
>
> 3. It is not interposed for any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation.
>
> . . . .
>
> If a motion, pleading, or other paper is signed in violation of this section, the court, upon motion or upon its own initiative, shall impose upon the person signing, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion, pleading, or other paper, including a reasonable attorney fee.

By signing her name, the signor is certifying that she: (1) has [*14] read the document, (2) has concluded after reasonable inquiry into the facts and law that there is adequate support for the filing, and (3) is acting without any improper motive. *Weigel*, 467 N.W.2d at 280. These are referred to as the "reading, inquiry, and purpose elements." *Id.* It is only whether the attorney made a reasonable inquiry into the facts and the law that is at issue in the present case.

The primary goal of this rule and statute is to require a high degree of professionalism in the practice of law by discouraging parties and their attorneys from filing frivolous lawsuits. *Id.* at 282; *see also* *Mathias*, 448 N.W.2d at 445. The rule was adopted in response to a growing concern over misuse and abuse of the litigation process. *Mathias*, 448 N.W.2d at 445. An attorney's advocacy role does not supersede her role as an officer of the court. *See* *Weigel*, 467 N.W.2d at 282. The statute *requires* sanctions to be imposed upon a finding of a violation of the statute to reduce the reluctance of courts to impose sanctions on attorneys who violate their responsibility to the court and other parties. *Mathias*, 448 N.W.2d at 445.

In determining whether there has been a violation of the statute, [*15] the attorney's actions must be judged objectively. *Weigel*, 467 N.W.2d at 281. We must decide whether the attorney's actions were reasonable under the circumstances known at the time she signed the documents. *Id.* at 280. Hindsight gained afterward through discovery, hearings, and evidence cannot be considered. *Id.* at 280-81. We must compare the attorney's actions to that of a reasonably competent attorney admitted to practice law in Iowa. *Id.* at 281. Although the statute focuses on the circumstances present upon signing, the rule may also be violated by the signing of a series of filings creating a pattern of conduct. *Mathias*, 448 N.W.2d at 447. The rule applies to each filing. *Id.* Other sanctions are available to address abusive tactics not related to the signing of pleadings, motions, and other papers. *Cf.* Iowa R. Civ. P. 1.517, 1.602(5), 1.701(6).

The district court found that, based on the facts known to Barnhill when she signed the original and four supplemented petitions between March 2001 and March 2002, as well as other court filings thereafter, there was no reasonable support in the law to assert the claims made against Humphreys, the president and C.E.O. of Tamko. The final [*16] amended petition alleged the following against Humphreys: (1) breach of express warranty, (2) breach of implied warranty, (3) fraudulent misrepresentation, (4) negligent misrepresentation, (5) rescission based on an impermissible liquidated damages clause, (6) rescission based on the unconscionability of an express warranty, and (7) violation of a Missouri unfair business practices act.

The relevant factors to consider in determining whether an attorney made a reasonable inquiry into the law include: (1) the amount of time that was available to the signer to research and analyze the relevant legal issues, (2) the complexity of the factual and legal issue in question, (3) the clarity or ambiguity of existing law, (4) the plausibility of the legal positions asserted, (5) the extent to which counsel had to rely upon other counsel to conduct the legal research and analysis underlying the position asserted, (6) the resources reasonably available to the signer to devote to the inquiry, and (7) the extent to which the signer was on notice that further inquiry might be appropriate. *Mathias*, 448 N.W.2d at 446-47. We note that Barnhill had ample time to research the facts and the law. This case [*17] was brought subsequent to the dismissal of a similar federal case. There is no assertion that Barnhill had to rely on others for her legal and factual research. In her brief, she states that she personally did extensive research. In addition, the longevity of these proceedings afforded her the opportunity to personally depose many witnesses. Keeping these factors in mind, we proceed to our analysis.

A. Breach of Express and Implied Warranties

The district court was correct when it found there was no reasonable basis for a breach of warranty claim against Humphreys. As the district court points out, a breach of warranty claim is a contract claim. An officer of a corporation is not liable for the contracts of the corporation unless personally guaranteed by the officer, and Barnhill never made any claim for piercing the corporate veil. *See* Iowa Code § 490.830(4) (2001). Barnhill, however, argues that a breach of warranty claim can be a tort claim when it involves safety hazards. Regardless of whether this contention is supported by law, there were never any allegations that the shingles caused harm to any person or property. Therefore, the alleged inadequacy of the shingles was only a "defect [*18] of suitability and quality," which, as Barnhill points out, is litigated through contract law.

Relative to the breach of warranty claims, Barnhill may have correctly interpreted the dicta in *Tomka v. Hoechst Celanese Corp.*, 528 N.W.2d 103 (Iowa 1995), as providing for a warranty claim within tort law, but the facts of this case fail to support such a claim. *Tomka* holds that when a product fails in its intended purpose the action is within contract law, but when the product causes harm beyond the consequences of its failure to satisfy its intended purpose, the action is within tort law. *Tomka*, 528 N.W.2d at 107. Barnhill alleged only that the shingles were inadequate to accomplish their purpose of protecting the buildings from the weather. There was never a claim made that the shingles caused harm to any person or property. The relief sought in the lawsuit was only repair or replacement of the shingles, not compensation for damages caused by the shingles. Stating that the shingles were blowing off is not a sufficient assertion to make a claim for personal or property damage beyond that caused by the failure of the shingles to protect the buildings.

Barnhill points out that the uniform [*19] jury instructions do not require a description of the damages, but merely the amount of damages. From this she concludes that there was no requirement that she claim damages to a person or property. Yet, it is fundamental in our legal system that, in order to prove an amount of damages, the injury suffered must be proven. *See* *Patterson v. Patterson's Estate,* 189 N.W.2d 601, 605 (Iowa 1971) (stating that "[i]f it is speculative and uncertain whether damages have been sustained, recovery is denied"). Any reasonable attorney licensed to practice law would know this. Given the facts known to Barnhill at the point at which she signed the petitions and other court documents, no reasonable attorney would have found the facts sufficient to support a breach of warranty claim under a tort theory. Therefore, there was no basis for such a claim against Humphreys, as CEO and president of Tamko.

B. Fraudulent Misrepresentation

The petition alleged that Tamko and Humphreys made express written and oral representations that Tamko shingles were of superior, long-lasting quality when Humphreys knew the shingles would not meet this standard due to a major defect. Further, the petition alleged that Humphreys [*20] limited the warranty in an unfair and unconscionable manner in light of the defect. Barnhill claims that Humphreys should be held liable because he was in charge of all corporate operations, including warranties, research, and development.

Although Barnhill briefed several pages arguing to this court that Humphreys should be held liable for fraudulent misrepresentation because of his numerous acts of approving the representations made, the district court gave Barnhill the benefit of the doubt that Humphreys' actions were sufficient to hold him liable for such representations. Notwithstanding, the district court found that Barnhill had violated rule 1.413 by stating the untrue facts in the petition that Humphreys actually made the representations and by making false statements in court documents that the class of plaintiffs relied on the representations in purchasing the Tamko shingles.

Barnhill claims the assertions in the petition that Humphreys made the false representations were supported by facts. Specifically she claims Humphreys made these representations through the warranties and advertising materials because he had the final authority as to their contents. The court points [*21] out that it is not correct to allege that Humphreys *made* the representations, even if he was responsible for the representations in the warranties and literature. In addition, Barnhill points to the evidence that Humphreys had a conversation with Ron Grubb, the president of Jerry's Homes, in which he told Grubb that the problems with the shingles had been fixed because they had changed their sealant in 1995 or 1996. However, there was no evidence that any other plaintiff even knew who Humphreys was. Barnhill claimed in her "Statement of Contested Facts" that plaintiff Hollinger had relied on the information when he selected Tamko shingles. However, the district court found Hollinger's deposition testimony that he relied on the twenty-five year warranty to be insufficient to conclude that he relied on the false information. We agree with the judgment of the district court.

Barnhill asserts that "a plaintiff who alleges fraud by deceit is not required to prove reasonable reliance on the fraudulent misrepresentation by deceit." Regardless of whether this statement of the law is reasonable, the fact remains that Barnhill made a false assertion in the petition and throughout the litigation [*22] that plaintiffs did, in fact, rely on the representations. Barnhill claims the law does not require her to prove reliance in cases of material nondisclosure because of the difficulty of proving reliance on information not present. Instead, she claimed reliance can be inferred. Even so, the vast majority of the class of plaintiffs did not participate in the decision to place Tamko shingles on their house. Therefore, there could be no reasonable inference of reliance on the part of these individuals. Barnhill's numerous statements to the court as to the participation of the individual class members in selecting the shingles for their homes was often times unsupported by the facts. As this court noted when this case was before it, there were only three plaintiffs who stated they had seen a product brochure. *Sharp*, No. 02-0728, 2004 Iowa App. LEXIS 1250 (Iowa Ct. App. Nov. 15, 2004). The facts fail to support the contention that the class of approximately seven hundred people in any way relied on information provided by Tamko.

C. Negligent Misrepresentation

The district court found three reasons why Barnhill's claim of negligent misrepresentation was a violation of rule 1.413: (1) The law is clear that no claim of [*23] negligent misrepresentation could be enforced against Tamko or Humphreys because claims of negligent misrepresentation apply only to persons who are in the business of supplying information; (2) Even if Humphreys is personally guilty of making negligent misrepresentations, he is not personally in the business of selling shingles or information regarding those shingles; and (3) Barnhill cannot prove plaintiffs' reliance on the information.

Barnhill claims the court's reliance on *Meier v. Alfa-Laval, Inc.*, 454 N.W.2d 576 (Iowa 1990), is misplaced. Specifically, she notes that *Meier* does not specifically hold that a manufacturer can never be liable for negligent misrepresentation. We agree with the district court that the *Meier* case clearly precluded Tamko and Humphreys from being liable for negligent misrepresentation because they were not in the business of supplying information. In *Meier* the Iowa Supreme Court found that the law warranted a claim of negligent misrepresentation against neither the seller nor the manufacturer of a product because neither was in the business of supplying information. *Meier*, 454 N.W.2d at 582. Research of Iowa law suggests no other theory of holding a manufacturer [*24] liable for negligent misrepresentation.

D. Rescission

The rescission claims made against Humphreys are obviously contract claims and were invalid for the same reasons as the warranty claims. These reasons have been sufficiently set out above and in the district court's ruling. Therefore, no further analysis is required.

E. Violation of Missouri Statute

Even though Barnhill points out that violation of the Missouri statute was never pled against Humphreys, he was in fact required to defend against the claim. In her resistance to defendants' motion for summary judgment filed with the court, Barnhill concluded that "material facts exist which impose personal liability on Defendant Humphreys and preclude summary judgement in favor of Defendant Humphreys on the issue of violation of the Missouri Unfair Business Practices Act."

Barnhill argues that the jurisdiction and venue requirements of the Missouri statute could be read to require only that the challenge be brought in *any* court in which the transaction took place. This is not a reasonable interpretation of the statute.

Even giving Barnhill the benefit of the doubt that it was proper to pursue some of the claims she raised, she still made [*25] additional claims against Humphreys that were not supported by the law and facts and thus not proper. Humphreys was forced to defend himself against these improper claims. The district court, therefore, did not abuse its discretion in granting Humphreys motion for sanctions and subsequently sanctioning Barnhill $ 25,000.

AFFIRMED.

Miller, J., concurs; Vaitheswaran, J., dissents.

DISSENT BY: VAITHESWARAN

DISSENT

VAITHESWARAN, J. (dissenting)

I respectfully dissent. Plaintiffs' counsel named the president of Tamko individually on the ground that he "directed and controlled" the actions of Tamko. Subsequent filings articulated her view that Mr. Humphreys "directed, authorized, or participated" in the claimed conduct. This allegation finds support in Iowa law. *See Haupt v. Miller*, 514 N.W.2d 905, 907 (Iowa 1994) ("As a general rule, corporate officers are individually liable to third parties for their torts, even when occurring while they act in their official corporate capacity" and "To maintain a tort claim against a director in his or her personal capacity, a plaintiff must first show that the director specifically authorized, directed or participated in the allegedly tortious conduct."). Therefore, I believe [*26] the fourth amended petition was "grounded in fact" and "warranted by existing law or a good faith argument for extension, modification, or reversal of existing law." Iowa R. Civ. P. 1.413(1).

In reaching this conclusion, I have considered defense counsel's assertion that plaintiffs' counsel may have made unsubstantiated verbal statements to the court. I believe this assertion is irrelevant to the sanctions analysis. *See Mathias v. Glandon*, 448 N.W.2d 443, 447 (Iowa 1989); Mark S. Cady, *Curbing Litigation Abuse and Misuse: A Judicial Approach*, 36 Drake L. Rev. 483, 496 (1986-87) ("misstatements of law, failure to disclose directly adverse authority and omission of critical facts may violate an attorney's code of ethics, but they do not violate an attorney's duty to make a legal inquiry under the rule unless no 'plausible good faith argument' is advanced") (citation omitted).

I have also considered defense counsel's critique of the factual allegations against Mr. Humphreys, including the choice of words in those allegations. Given our state's emphasis on notice-pleading, "[t]he lack of factual specificity in the pleadings must not be used as the gauge in determining a violation of the [*27] standard." Cady, 36 Drake L. Rev. at 494.

Nor is it relevant that the plaintiffs were ultimately unsuccessful in their efforts to pin liability on Mr. Humphreys. *Id.* at 492 ("The rule does not establish a standard which results in sanctions simply because the factual claim later falls victim to summary adjudication."). While certain counts of the fourth amended petition were weaker on the merits than others, "the duty [under rule 1.413] is not breached when merely one argument or sub-argument behind a valid pleading or motion is without merit." *Id.* at 496.

Rule 1.413 recognizes the right of attorneys to make good faith arguments for modification of existing law. To that end,

> Close scrutiny of an attorney's duty under the rule can have the effect of stifling legal creativity, repressing vigorous advocacy, multiplying expansive satellite litigation over sanctions, and creating a danger of arbitrary and inconsistent enforcement. The rule was not intended to chill an attorney's enthusiasm or creativity in pursuing legal or factual theories.

Id. at 495 (citation omitted).

There is no question "the line between an abusive claim and zealous advocacy can be extremely fine." *Id.* at 497. I am not [*28] convinced plaintiffs' counsel crossed that line. Accordingly, I would reverse the sanctions rulings.

LEXSEE

MARK BAUMKEL, on behalf of himself and all others similarly situated, Plaintiffs, v. THE SCOTTS MIRACLE-GRO CO., an Ohio corporation, d/b/a SCOTTS LAWNSERVICE, EG SYSTEMS, INC., an Indiana corporation, d/b/a SCOTTS LAWNSERVICE, Defendants.

CASE NO. 08-14137

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2009 U.S. Dist. LEXIS 90463

September 28, 2009, Decided
September 28, 2009, Filed

COUNSEL: [*1] For Mark Baumkel, Plaintiff: Darryl G. Bressack, E. Powell Miller, Lauren G. Northrop, The Miller Law Firm, Rochester, MI.

For Scotts Miracle-Gro Company, Doing business as Scotts Lawnservice, EG Systems, Inc, Doing business as Scotts Lawnservice, Defendants: David C. Lashway, Neil K. Gilman, Hunton and Williams, Washington, DC; Shawn P Regan, Hunton & Williams, New York, NY; Thomas G. McNeill, Dickinson Wright, Detroit, MI.

JUDGES: HONORABLE Denise Page Hood, United States District Judge.

OPINION BY: Denise Page Hood

OPINION

MEMORANDUM OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND DISMISSING ACTION

I. INTRODUCTION

This matter is before the Court on Defendants' Motion to Dismiss, filed on January 15, 2009. Plaintiff filed a Brief in Opposition to Defendants' Motion to Dismiss on February 9, 2009. [1] On February 19, 2009, Defendants filed a Reply Brief in Further Support of their Motion to Dismiss. [2] A hearing on this matter was held on April 29, 2009. [3]

1 Plaintiff filed a Corrected Brief in Opposition on February 10, 2009.

2 Additionally, on February 25, 2009, Plaintiffs filed a Motion for Leave to File a Second Amended Class Action Complaint seeking to add a count alleging Trespass, and an additional allegation [*2] in Plaintiff's breach of contract claim. The Magistrate Judge granted in part and denied in part Plaintiff's request on April 3, 2009. The April 3, 2009 Order denied amendment to include a count of Trespass, but granted the request to include paragraph forty-seven (47) to the breach of contract claim. Paragraph forty-seven (47) of Plaintiffs' Second Amended Complaint states:

> In addition, Defendants' application of illegal and unregistered pesticides to the lawns of Plaintiff and the Class members, breached the implied terms of good faith and fair dealing.

See Doc. No. 29, Plf.'s Second Am. Compl., P 47. On April 8, 2009, Defendants filed a Supplemental Brief in Support of their Motion to Dismiss addressing Plaintiff's New Good Faith and Fair Dealing Allegation, and Plaintiffs filed a Supplemental Brief in Opposition to Defendants' Supplemental Brief in Support of Their Motion to Dismiss on April 15, 2009. Defendants filed a Reply in Support of their Motion to Dismiss Addressing Plaintiffs' New Good Faith and Fair Dealing Allegation on April 17, 2009.

3 After the [*3] hearing, Defendants filed a Notice seeking to clarify counsel's response to

this Court's question on the issue of personal jurisdiction.

II. STATEMENT OF FACTS

Plaintiff, Mark Baumkel, on behalf of himself and all others similarly situated, files this action pursuant to the Class Action Fairness Act (CAFA), 28 U.S.C. § § 1332(d)(2) and (d)(6). Plaintiff brings claims for breach of contract, unjust enrichment, and violation of the Michigan Consumer Protection Act against Defendants, The Scotts Miracle-Gro Company (SMG) and EG Systems, Inc. (EG). Plaintiff asserts that Defendants operate in Michigan under the name Scotts LawnService (SLS), which provides lawn care services to homeowners. These services include a lawn assessment and a treatment strategy, which may include fertilizer applications, pesticide applications, and/or herbicide applications.

Plaintiff entered into a contract with Scotts LawnService in March of 2008 to provide lawn care services in exchange for payment of a specified fee.

The use of pesticides is regulated by the U.S. Environmental Protection Agency (EPA), and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), which requires that all lawn care products [*4] that contain pesticides must be registered with the EPA before they can be lawfully sold or distributed.

On May 9, 2008, Defendants issued a public recall of four pesticides that the EPA found were unregistered, falsely and misleadingly labeled, or both. In May of 2008, Plaintiff received a notice that at least one of the recalled illegal pesticides, number 538-304, which contained .28% Halts Pro, had been used on his lawn. Plaintiff alleges that Defendants' use of illegal pesticides is neither isolated or random, but a pattern of distributing unapproved pesticides to unsuspecting consumers. Plaintiff further asserts that customers paid for Defendants' lawn care services based on the express and/or implied agreement that defendant was not using illegal pesticides. Plaintiffs also argue that by failing to register these pesticides, Defendants saved costs in research and application materials and registration fees. It is Plaintiff's contention that in doing so, Defendants violated the express and/or implied agreement not to use illegal pesticides and risked exposing Plaintiff and other customers to potentially hazardous pesticides.

Plaintiff alleges a breach of contract claim in Count [*5] I of the Second Amended Class Action Complaint, arguing that Defendants failed to provide Plaintiff and the Class members with safe and lawful lawn care services despite Defendants' contract which contains the language "satisfaction guarantee" and "[y]ou take no risk with Scotts LawnService . . . service programs." *See* Doc. No. 29, Plf.'s Second Am. Compl., P 43. By failing to provide the promised services, Defendants breached Plaintiff's and the Class members' contracts, as well as breached the implied terms of good faith and fair dealing in said contracts. In the alternative, Plaintiff asserts a claim of unjust enrichment in Count II of his Second Amended Class Action Complaint because Defendants received the benefit of Plaintiff's and the Class members' fees and it would be inequitable for Defendants to retain said benefits despite the use of illegal pesticides without disclosure or warning because the amount of benefits received far outweighs the services received by Plaintiffs. Lastly, in Count III, Plaintiff asserts that Defendants violated Michigan's Consumer Protection Act, MICH. COMP. LAWS § 445.901, *et seq*. Plaintiff alleges that Defendants' use of the illegal pesticides [*6] caused Plaintiff and the Class members damages.

Defendants argue in their present motion that dismissal is warranted as to SMG pursuant to Federal Rule of Civil Procedure 12(b)(2), because the Court lacks personal jurisdiction over SMG, which has had no contacts with Plaintiff nor does SMG conduct any business in the State of Michigan. Defendants further assert that even if this Court had personal jurisdiction over SMG, this action should be dismissed because the Second Amended Class Action Complaint fails to state a claim against either SMG or EG.

III. APPLICABLE LAW & ANALYSIS

A. Personal Jurisdiction

Federal Rule of Civil Procedure 12(b)(2) provides for dismissal for lack of jurisdiction over a person. Fed. R. Civ. P. 12(b)(2). When the issue of personal jurisdiction is raised, the burden of proof rests upon the party asserting jurisdiction. *Market/Media Research, Inc. v. Union-Tribune Publishing Co.*, 951 F. 2d 102, 104 (6th Cir. 1992). This burden can be met with establishing with reasonable particularity sufficient contacts between the defendant and the forum state to support personal jurisdiction. *Neogen Corp. v. Neo Gen Screening, Inc.*, 282 F. 3d 883, 887 (6th Cir. 2002) (quotation [*7] and citation omitted). The facts will be construed in the light most favorable to the nonmoving party. *Id*. The court need only determine whether the plaintiff presented a prima facie showing of jurisdiction on the face of the complaint. *Market/Media Research, Inc.*, 951 F. 2d at 104. This may include the pleadings and any affidavits to support any factual allegations. *Id.* Dismissal is warranted only if all the facts plaintiff asserts "collectively [fail] to state a prima facie case for jurisdiction." *Id.* at 105. A district court is not required to hold an evidentiary hearing when a plaintiff's pleadings and affidavits are insufficient to make a prima facie showing of fact supporting the court's assertion of in personam jurisdiction. *Id.* at 106.

The Court may exercise personal jurisdiction over a nonresident defendant only to the extent permitted by the Michigan long-arm statute and the Due Process Clause. *See Calphalon Corp. v. Rowlette*, 228 F. 3d 718, 721 (6th Cir. 2000) ("In dealing with a diversity case, we look to the law of the forum state to determine whether personal jurisdiction exists."). Michigan's long-arm statute provides both "general" and "limited" jurisdiction over nonresident [*8] corporations. General personal jurisdiction over corporations exists when:

> The existence of any of the following relationships between a corporation and the state shall constitute a sufficient basis of jurisdiction to enable the courts or record of this state to exercise general personal jurisdiction over a corporation and to enable such courts to render personal judgments against the corporation: (1) Incorporation under the laws of this state; (2) Consent, to the extent authorized by the consent and subject to the limitations provided in section 745; (3) the carrying on of a continuous and systematic part of its general business within the state.

MICH. COMP. LAWS § 600.711. With respect to limited personal jurisdiction over a corporation or its agent, Michigan law provides:

> The existence of any of the following relationships between a corporation or its agent and the state shall constitute a sufficient basis of jurisdiction to enable courts of record of this state to exercise limited personal jurisdiction over such corporation and to enable such courts to render personal judgments against such corporation arising out of the act or acts which create any of the following relationships: [*9] (1) The transaction of any business within the state; (2) The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort; (3) The ownership, use, or possession of any real or tangible personal property situated within the state; (4) Contracting to insure any person, property, or risk located within this state at the time of contracting; (5) Entering into a contract for services to be performed or for materials to be furnished in the state by the defendant.

Michigan courts have construed Michigan's long-arm statute to bestow the greatest possible grant of personal jurisdiction consistent with due process. *See Sifers v. Horen*, 385 Mich. 195, 199, 188 N.W.2d 623; 385 Mich. 195, 188 N.W.2d 623 (1971). Where a state's long-arm statute extends to the constitutional limits of the Due Process Clause, the two inquiries merge; courts must only determine whether an assertion of personal jurisdiction violates the Due Process Clause. *Nationwide Mut. Ins. Co. v. Tryg Int'l Ins.* Co., 91 F. 3d 790, 793 (6th Cir. 1996). The Sixth Circuit has set forth a three-part test to determine whether due process requirements have been met:

> First, the defendant must purposefully avail himself of [*10] the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise form the defendant's activities there. Finally, the acts of the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Kerry Steel, Inc. v. Paragon Indus., Inc. 106 F. 3d 147, 150 (6th Cir. 1997) (known as the *Mohasco* factors set forth in *Southern Mach. Co. v. Mohasco Indus., Inc.*, 401 F. 2d 374, 381 (6th Cir. 1968)).

Plaintiff alleges that "Defendant EG Systems, Inc. is affiliated with Defendant The Scotts Miracle-Gro Company" and both do business as 'Scotts Lawn Service' Plaintiff's asserts that its claims apply to both entities. *See* Doc. No. 29, Plf.'s Second Am. Compl., P 10. Defendant argues that EG is a subsidiary of SMG, an Ohio holding company whose sole activity is to hold stock in its subsidiaries. *See* Ex. A, Defs.' Mot. to Dismiss, Crowder Decl. P 3, 8. Christopher Crowder, SMG's Assistant Corporate Secretary indicates that he can testify to the following facts: (1) SMG has no office, place of business, or employees in the State of Michigan, (2) SMG is not authorized [*11] to conduct any business in the State of Michigan, (3) SMG does not sell any products or services in the State of Michigan, nor does it do business as Scotts Lawn Service. *Id.* at P 4-6, 9, 12. Mr. Crowder further declares that SMG websites, www.scotts.com and www.scottsmiracle-gro.com do not sell any products or services. *See* Notice of Filing, Ex. 1. Rod Imbriani, Vice President of Marketing for EG

Systems, Inc., which does business as Scotts LawnService, and which has the website www.scottslawnservice.com, stated that the website does not sell any products but does (since January of 2009) have a feature allowing consumers to sign up for the company's lawn care services. *Id.*, Ex. 2.

"Mere ownership of a subsidiary that conducts business in the forum state is one factor which weighs in favor of sufficient minimum contacts, but it is not of itself significant enough to establish personal jurisdiction over the parent corporation." *Niemi v. NHK Spring Co.*, 276 F. Supp. 2d 717, 721 (E.D. Mich. 2003). However, a district court may assert personal jurisdiction over a parent corporation when the subsidiary's contacts are attributed to the parent corporation or where the "the parent purposefully [*12] avails itself of doing business in the forum by accessing the market through a subsidiary." *Id*. In order to succeed on a theory that EG Systems is the alter-ego of SMG, Plaintiff must demonstrate, either through his pleadings, or affidavits that this cause of action arises out of SMG's contacts with Michigan. *Id.* at 721-23. Plaintiff has failed to make such a demonstration.

SMG asserts that it does not sell any products or services but is only an Ohio holding company, whose function is to hold stock in its subsidiaries. Plaintiff's Second Amended Class Action Complaint states that on May 9, 2008, the EPA issued a public recall of unregistered pesticides, including pesticides that were used on Plaintiff's lawn. *See* Doc. No. 29, Plf.'s Second Am. Compl., P 20, 22. The Second Amended Complaint further alleges that the EPA website addressing this recall explained that:

> a. In April and May 2008, EPA ordered The Scotts Miracle-Gro Company and its affiliates . . . to stop distributing and selling four pesticide products that were unregistered or improperly labeled. Scotts recalled these products from retailers, consumers, and the company's lawn care affiliate, Scotts LawnService. . . As part [*13] of EPA's investigation into Scotts pesticide products, in June, September and October 2008, EPA issued 'stop sale, use or removal' orders for 11 more Scotts products . . . .

See Doc. No. 29, Plf.'s Second Am. Compl., P 21. This recall notice is insufficient to withstand dismissal of SMG for lack of personal jurisdiction. Plaintiff has submitted no evidence that SMG has direct control or wholly funds its subsidiaries. Nor is there any other indication that SMG is anything other than a passive owner of its subsidiaries stocks. As such, it cannot be argued that SMG 'purposely availed itself' by doing business through its alter ego, EG Systems. Nor has Plaintiff established that any conduct on the part of SMG in the forum state, resulted in this cause of action. Without sufficient contacts, assertion of personal jurisdiction over SMG will be unreasonable and violate due process. Lastly, the Court will not entertain Plaintiff's allegation that SMG is subject to this Court's jurisdiction because it conspired with Scotts LawnService as there is no claim of conspiracy alleged in the Second Amended Class Action Complaint.

B. Failure to State a Claim

1. Breach of Contract

Defendants also argue that [*14] Plaintiff's Second Amended Class Action Complaint is subject to dismissal because Plaintiff has failed to plead sufficient facts to state a claim for breach of contract. Defendants argue that Plaintiff has failed to state a claim because the contract at issue contains no obligation, express or implied, to provide 'safe and lawful lawn care service.' In any event, even if an obligation were found to exist, and Defendant breached this obligation, Plaintiff nonetheless fails to state a claim because he has not alleged any cognizable injury resulting from Defendant's alleged breach of the parties' contract.

A motion brought pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the plaintiff's Complaint. *Davey v. Tomlinson*, 627 F. Supp. 1458, 1463 (E.D. Mich. 1986). A court takes the factual allegations in the Complaint as true when evaluating the propriety of dismissal under Fed. R. Civ. P. 12(b)(6). *Ziegler v. IBP Hog Market, Inc.*, 249 F.3d 509,512 (6th Cir. 2001); *Hoeberling v. Nolan*, 49 F. Supp.2d 575, 577 (E.D. Mich. 1999). Further, the court construes the complaint in the light most favorable to the plaintiff, and determines whether it is beyond a doubt [*15] that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *Varljen v. Cleveland Gear Co., Inc.*, 250 F.3d 426, 429 (6th Cir. 2001).

Plaintiff argues that "safety" and "legality" are terms of the contract because the contract contains the statement "satisfaction guarantee" with express terms which state that "You take no risk with Scotts LawnService." The contract further provides "10 Reasons You Can Trust Scotts LawnService" including "We use Scotts Ortho and Miracle-Gro superior products" and "We care about your lawn and the environment." It is Plaintiff's contention that by failing to provide safe and lawful lawn care services, Defendant breached its contractual responsibilities. Plaintiff also asserts that Defendant breached the contract terms of good faith and fair dealing, implicit in every contract, by providing a service utilizing a product in violation of FIFRA and state laws.

There is no dispute that a valid contract exists between the parties. However, under Michigan law, in order for Plaintiff to succeed on his breach of contract claim he must also establish "by a preponderance of the evidence the terms of the contract, and the defendant [*16] breached the terms of the contract, and that the breach caused plaintiff's injury." In re Brown, 342 F. 3d 620, 628 (6th Cir. 2003). [4]

4 A federal court sitting in diversity applies the law of the state in which it sits. *See* *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

There are no express terms in the written contract requiring Scotts LawnService to provide 'safe and lawful lawn care services.' In any event, the terms Plaintiff relies on in support of his breach of contract claim are merely general marketing claims regarding Defendant's lawn care services. *See* *Uebelacker v. Paula Allen Holdings*, 464 F. Supp. 2d 791, 805-06 (W.D. Wis. 2006) ("Quality satisfaction guaranteed" is a classic example of commercial 'puffery' on which no reasonable person would rely."); *See also,* *Viches v. MLT, Inc*. 124 F. Supp. 2d 1092, 1098 (E.D. Mich. 2000) (holding that under Michigan law's definition of 'puffing,'a defendant's "slogan of a 'worry-free' vacation is . . . mere puffing and does not rise to the level of guaranteeing an 'injury free' vacation.") *Id.* In any event, Plaintiff concedes that the terms it relies upon in support of its theory that 'legality' and 'safety' are part of the parties' [*17] agreement, are implied terms rather than express terms. The Court reaches such a conclusion based upon Plaintiff's failure to address Defendants' argument regarding express terms in his Responsive Brief in Opposition to Defendants' Motion to Dismiss. *See* Docket No. 18.

A contract term may be implied only where circumstances surrounding the transaction indicate that such terms reflect "the actual intent of the parties at the time of contracting."

Redinger v. Standard Oil Co., 6 Mich. App. 74, 79, 148 N.W.2d 225 (1967) (citing *W.J. Howard & Sons, Inc. v. Meyer*, 367 Mich. 300, 308, 116 N.W.2d 752 (1962)). Here, the parties' intent was for Defendants to provide lawn care services to Plaintiff's lawn, which included application of Defendants' products. Plaintiff has not alleged in his Complaint that Defendants failed to perform under the Contract. Rather, Plaintiff asserts that 'safety' and 'legality' were terms of the parties agreement. As such, it appears that Plaintiff's breach of contract claim is couched as a products liability claim. Plaintiff has failed to allege the circumstances surrounding the parties' transaction which rendered the terms 'safety' and 'legality' implicit in the parties' agreement.

As to Plaintiff's [*18] argument regarding Defendants alleged breach of an implied duty of good faith and fair dealing, Plaintiff asserts that "the breach is in Defendant's violation of the term of 'trust' . . . ." Plf.'s Br. in Opp., at 9. The relevant language in the parties' agreement is: "You can trust Scotts Lawn Service." *See* Sec. Am. Class Ac. Comp., Ex. 1. The implied duty of good faith and fair dealing does not apply where express provisions of the parties' contract govern. *See* *Ferrell v. Vic Tanny International, Inc.*, 137 Mich. App. 238, 244; 357 N.W.2d 669 (1984). *See also,* *Van Arnem Co. v. Manufacturers Hanover Leasing Corp.*, 776 F. Supp. 1220, 1223 (E.D. Mich. 1991). The implied covenant of good faith and fair dealing applies when "a party to a contract makes the manner of its performance discretionary." *Busch v. Dyno Nobel, Inc.*, No. 00-1808, 40 Fed. Appx. 947, 962 (6th Cir. July 18, 2002). It "serves to supply limits on the parties' conduct when their contract defers decision on a particular term, omits terms or provides ambiguous terms." *Id.*

Here, the intent of the parties' agreement was for Plaintiff to pay for, and Defendant to provide lawn care services, including the use of its Scotts Miracle [*19] products. As such, under the contract, Plaintiff's lawn care services, and specifically, which Scotts Miracle products were appropriate for the care and maintenance of his lawn, was left to the discretion of Defendants. In *Busch*, the parties entered into an agreement to produce ethylene glycol, which included the design and construction "of a plant to provide an economical manufacturing process." *Id.* at 949. The *Busch* court concluded that there remained a question of fact as to whether the defendant breached the implied duty of good faith and fair dealing when the defendant "abandoned the project before it was fully operational . . . ." *Id.* at 963. The defendant had agreed to "provide such technical assistance and training as [the defendant] determines reasonably necessary to enable [the plaintiff] to properly install and operate the equipment . . . ." *Id.* at 962. Finding that this provision vested discretion in the defendant which must be carried out in good faith, the *Busch* court held that "the provision governing technical assistance clearly vested discretion in [the defendant] to determine the adequacy of the training and technical support . . . . [The defendant] represented itself [*20] as having superior knowledge and training related to plant construction." *Id.* at 962. This is similar to the present matter, Defendants held themselves out to "have the right products for your lawn needs and we have a name you can trust." *See* Sec. Am. Class Ac. Comp., Ex. 1.

Defendants were vested with the discretion to maintain and care for Plaintiff's lawn, including the application of Defendants' products, requiring that such services be carried out in good faith.

However, even if Plaintiff sufficiently alleged facts in support of his theory that Defendant breached the implied duty of good faith and fair dealing, Plaintiff has failed to allege any injury. Plaintiff alleges that "[a]s a direct and proximate result of Defendants' breaches of contract, Plaintiff and the Class members have incurred damages." *See* Sec. Am. Class Ac. Comp., at P 48. The parties to a contract are entitled to the benefit of the bargain as set forth in their agreement. *See Ferguson v. Pioneer State Mut. Ins. Co.*, 273 Mich App. 47, 54, 731 N.W.2d 94 (2006). The proper measure of damages is the difference between the actual value of full performance of the services bargained for, and the value of the performance [*21] actually received by the non-breaching party. *See Gross v. Morosky*, 366 Mich. 114, 116, 113 N.W.2d 863 (1962).

In *Gross*, the sellers of rental property represented that it was a five-unit apartment building, even though the municipal regulation permitted use of the premises as a two-unit residential apartment building. *Id*. The Court found that despite the defendant's breach of the parties' agreement, the plaintiffs were not entitled to judgment in their favor because they were allowed to maintain the building as a five-unit rental property during the entirety of their possession of the subject property, as such they were not prevented from utilizing the property in a manner consistent with the defendant's representations. *Id*. at 116-17.

In the matter before the Court, Plaintiff has failed to allege anything but conclusory allegations in regard to the injury he has suffered as a result of Defendant's alleged breach. There is no allegation that the products and services that Plaintiff actually received were of less value than the value of products and services that he expected to receive. Plaintiff argues that damages are uncertain at this state, but are a matter of fact to be established [*22] through discovery and further research. Plaintiff also asserts that a claim for breach of contract does not require establishment of damage or injury to the plaintiff. Plaintiff is simply incorrect and his reliance on *Scarff Bros., Inc. v. Bischer Farms, Inc*., in support of this contention is misplaced. 546 F. Supp. 2d 473 (E.D. Mich. 2003). In *Scarff*, the court held that "[i]n Michigan, a claim for breach of contract requires a showing of parties competent to contract, proper subject matter for a contract, legal consideration, mutuality of agreement, and breach." *Id*. at 485. The *Scarff* court was merely citing the law in Michigan for the a contract to be deemed valid, which must be established before a breach of that contract may be found. [5] As such, the Second Amended Class Action Complaint fails to plead any injury resulting from Defendants' alleged breach.

5 "To state a breach of contract claim under Michigan law, a plaintiff must first establish the elements of a valid contract. The elements of a valid contract in Michigan are 1) parties competent to contract, 2) a proper subject matter, 3) a legal consideration, 4) mutuality of agreement, and 5) mutuality of obligation. Once a valid [*23] contract has been established, a plaintiff seeking to recover on a breach of contract theory must then prove by a preponderance of the evidence the terms of the contract, that the defendant breached the terms of the contract, and that the breach[] caused the plaintiff's injury." *Eastland Partners Ltd. Partners v. Village Green Mgmt. Co.*, 342 F.3d 620, 628 (6th Cir. 2003) (internal quotations and citations omitted).

2. Unjust Enrichment

Plaintiff's unjust enrichment claim fails as a matter of law. If a plaintiff establishes 1) the receipt of a benefit by defendant from plaintiff, and 2) an inequity resulting to plaintiff because of the retention of the benefit by defendant. *Belle Isle Grill Corp. v. City of Detroit*, 256 Mich. App. 463, 478, 666 N.W.2d 271 (2003). If the plaintiff can establish these elements, "the law will imply a contract in order to prevent unjust enrichment." *Id.* "However, a contract will be implied only if there is no express contract covering the same subject matter." *Id*.

Plaintiff incorrectly argues that if no breach of contract claim has been properly plead, then Plaintiff must be able to plead the alternative theory of unjust enrichment. The fact that Plaintiff cannot state a [*24] claim for breach of contract does not negate the fact that the parties indeed had an express contract for lawn care services. Plaintiff's argument that because the contract between the parties does not expressly contemplate the subject matter, or a provision governing the parties' rights in the event of illegal pesticide usage is similarly without merit. Plaintiff's unjust enrichment claim relates to the application of pesticides in connection with Defendant's lawn care services. *See Moon v. SCP Pool Corp*., 2007 U.S. Dist. LEXIS 710, at *12 (E.D. Mich. Jan. 8, 2007) (a claim for unjust enrichment is unavailable when there is a contract governing the parties relationship, even if the parties "disagree on its scope, terms and effect.") As such, Plaintiff cannot allege an unjust enrichment claim in the alternative.

3. Michigan Consumer Protection Act

Plaintiff's claim under the MCPA also fails as a matter of law. Under the MCPA, "[u]nfair, unconscionable, or deceptive methods, acts, or practices in the conduct of trade or commerce are unlawful . . . ." MICH. COMP. LAWS § 445.903(1). However, the MCPA does not apply to "[a] transaction or conduct specifically authorized under laws administered [*25] by a regulatory board or officer acting under statutory authority of this state or the United States." MICH. COMP. LAWS § 445.904(1)(a).

The Michigan Supreme Court has held that whether a transaction is exempted from the MCPA turns on "whether the general transaction is specifically authorized by law, regardless of whether the specific misconduct alleged is prohibited." *Liss v. Lewiston-Richards*, 478 Mich. 203, 210, 732 N.W.2d 514; 478 Mich. 203, 732 N.W. 2d 514 (2007). "[T]he exception requires a general transaction that is 'explicitly sanctioned.' *Id.* at 213. In holding that "residential home builders are exempt from the MCPA because the general transaction of residential home building, including contracting to perform such transaction, is specifically authorized by the Michigan Occupational Code (MOC)" the court relied on the following: (1) residential home builders are licensed under the MOC, (2) residential home builders are regulated by the Residential Builders' Maintenance and Alteration Contractors' Board, and (3) a set of administrative rules regulate the licensing procedure, and (4) the transaction at issue, contracting to build a residential home, is specifically authorized by law. *Id.* at 206, 213.

Similarly, [*26] in the present matter, the transaction at issue, the application of a pesticide as part of the provision of lawn care services is subject to regulation by not only federal law under the FIFRA, but also under Michigan law pursuant to the Michigan Natural Resources and Environmental Protection Act, MICH. COMP. LAWS § 324.8301, et seq. Part 83 of that statute regulates the distribution, sale, use and application of pesticides in the State of Michigan. Part 83 requires a commercial applicator of pesticides to obtain a certification and license from the MDOA in order to lawfully apply pesticides. See Mich. Comp. Laws § § 324.8311, -.8314, 324.8302(15). The regulations also provide that "[b]efore applying a pesticide, a commercial applicator who is required to be licensed by [Part 83] . . . shall enter into an oral or written service agreement with the customer." Mich. Admin. Code § 285.637.12(1). As such, the transaction at issue is exempted from the MCPA as it is regulated by an expert agency with licensing, approval and enforcement authority; the lawn care services involving the application of pesticides is "specifically authorized" by law within the meaning of section 445.904(1)(a).

IV. [*27] CONCLUSION

Accordingly,

IT IS ORDERED that Defendant's Motion to Dismiss [**Docket No. 14, filed on January 15, 2009**] is GRANTED.

IT IS FURTHER ORDERED that this cause of action is dismissed.

/s/ Denise Page Hood

Denise Page Hood

United States District Judge

Dated: September 28, 2009

LEXSEE

BENDER DEVELOPMENT CO., INC., Appellant v. JENNIFER STREZA, Appellee

C.A. No. 03CA008397

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, LORAIN COUNTY

2004 Ohio 4576; 2004 Ohio App. LEXIS 4174

September 1, 2004, Decided

PRIOR HISTORY: [**1] APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO. CASE No. 02CV131431.

DISPOSITION: Judgment of the Court of Common Pleas affirmed.

COUNSEL: ROBERT J. GARGASZ, Attorney at Law, Lorain, Ohio, for appellant.

STEPHEN G. MECKLER, Attorney at Law, Elyria, Ohio, for appellee.

JUDGES: DONNA J. CARR, Presiding Judge. WHITMORE, J., BOYLE, J., CONCUR.

OPINION BY: DONNA J. CARR

OPINION

DECISION AND JOURNAL ENTRY

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

CARR, Presiding Judge.

[*P1] Appellant, Bender Development Co., Inc., appeals the decision of the Lorain County Court of Common Pleas, which granted summary judgment in favor of appellee, Jennifer Streza. This Court affirms.

I.

[*P2] Appellant is a firm engaged in buying and selling houses and land for purposes of development. Appellee is the owner of a vacant lot of land approximately 100' X 280' in Lorain County. The parties signed a "letter of mutual intent" in December 2001. According to the "letter of mutual intent," appellee would sell her property to appellant in exchange for the sum of $ 110,000 and a home with a minimum of 1700 square footage. [**2] In exchange, appellant would build 3 to 5 other units on the property at its expense and profit.

[*P3] On May 1, 2002, appellant filed a complaint against appellee for breach of contract and fraud. Appellee filed a motion for summary judgment on August 28, 2003. On September 12, 2003, appellant filed a motion in opposition to appellee's motion for summary judgment and a motion for partial summary judgment on the issue of breach of contract. Appellee filed a motion in opposition to appellant's motion for partial summary judgment.

[*P4] Appellant timely appealed, setting forth one assignment of error. Given that appellant's assignment of error contains in excess of two hundred words and includes part of its legal argument, this Court has reproduced only the statement of the actual assignment of error.

II.

ASSIGNMENT OF ERROR

> "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ISSUING ITS JUDGMENT FINDING THAT NO BINDING CONTRACT EXISTED BETWEEN THE PARTIES AND IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT AND BY FAILING TO GRANT APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT."

[*P5] In its sole assignment of error, appellant challenges [**3] the trial court's award of summary judgment in favor of appellee.

[*P6] An appellate court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St. 3d 102, 105, 1996 Ohio 336, 671 N.E.2d 241. This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12, 13 Ohio B. 8, 467 N.E.2d 1378.

[*P7] Pursuant to Civil Rule 56(C), summary judgment is proper if:

> "(1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party." *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

[*P8] The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to [**4] parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 1996 Ohio 107, 662 N.E.2d 264. The non-moving party must then present evidence that some issue of material fact remains for the trial court to resolve. Id. Where the non-moving party would have the burden of proving a number of elements in order to prevail at trial, the party moving for summary judgment may point to evidence that the non-moving party cannot possibly prevail on an essential element of the claim. See, e.g., *Stivison v. Goodyear Tire & Rubber Co.* (1997), 80 Ohio St.3d 498, 499, 1997 Ohio 321, 687 N.E.2d 458. The burden would then shift to the non-moving party to show that there is a genuine issue of material fact as to that element. *Dresher*, 75 Ohio St.3d at 293.

[*P9] The "letter of mutual intent" provided:

> "Furthermore, this letter of mutual intent is subject to Seller and Bender Development Inc. coming to a written agreement regarding floor plans, standard features, and other terms and agreements within 100 days of acceptance of this agreement. All terms, conditions, and floor plans must be signed for by both parties. ***"

[**5] Breach of Contract

[*P10] "Generally, a breach of contract occurs when a party demonstrates the existence of a binding contract or agreement; the non-breaching party performed its contractual obligations; the other party failed to fulfill its contractual obligations without legal excuse; and the non-breaching party suffered damages as a result of the breach." *Garofalo v. Chicago Title Ins. Co.* (1995), 104 Ohio App. 3d 95, 108, 661 N.E.2d 218. (Citations omitted.) A claimant seeking to recover for breach of contract must show damage as a result of the breach. *Metro. Life Ins. Co. v. Triskett Illinois, Inc.* (1994), 97 Ohio App.3d 228, 235, 646 N.E.2d 528; *Logsdon v. Ohio Northern Univ.* (1990), 68 Ohio App.3d 190, 195, 587 N.E.2d 942. Damages are not awarded for a mere breach of contract; the amount of damages awarded must correspond to injuries resulting from the breach.

[*P11] "A contract consists of an offer, acceptance, and consideration." *Bobinsky v. Tippett*, 9th Dist. No. 21444, 2003 Ohio 3787 at P9, citing *Tersigni v. Gen.Tire, Inc.* (1993), 91 Ohio App.3d 757, 760, 633 N.E.2d 1140. In *Normandy Place Assoc. v. Beyer* (1982), 2 Ohio St.3d 102, 105-106, 2 Ohio B. 653, 443 N.E.2d 161, [**6] the Supreme Court of Ohio stated: "The enforceability of [an agreement to make an agreement] depends rather on whether the parties have manifested an intention to be bound by its terms and whether these intentions are sufficiently definite to be specifically enforced."

[*P12] In her motion for summary judgment, appellee argued that the letter of mutual intent entered into by she and appellant was nothing more than an agreement to make an agreement. To support her motion, appellee attached the affidavit of Richard L. Bender, the president of Bender Development Company, Inc. ("Bender Development"), as well as a copy of the "letter of mutual intent." Appellee contended that the parties did not have a "meeting of the minds" sufficient to form a contract. Further, appellee argued that the terms of the letter of intent were not definite and certain enough to constitute a contract. In her motion for summary judgment, appellee listed several essential details regarding the construction of her unit that were to be agreed upon at a later date and set forth in a written agreement which was to be signed by both appellant and appellee. To support her argument, appellee presented the testimony [**7] of Richard Bender wherein he admitted that the letter of mutual intent did not contain all of the necessary information needed in order to begin the construction of appellee's unit.

[*P13] In its motion in opposition to appellee's motion for summary judgment and its motion for partial summary judgment on the issue of breach of contract, appellant argued that all the elements necessary to establish a contract existed between it and appellant. To support its motion, appellant attached the affidavit of Richard L. Bender. In his affidavit, Bender testified that he had many contacts with appellee after both parties executed the letter of intent. Bender testified that Bender Development fully performed all of its obligations under the letter of intent through the date appellee's attorney informed Bender Development's attorney that she no longer wanted to pursue the development of her property with Bender Development. Bender further testified that appellee approved and participated in acquiring the necessary variances from the City of Lorain for the project. Bender testified that the parties came to an agreement on the floor plans and standard features of appellee's unit. Bender testified [**8] that he and Bender Development relied on various statements made by appellee regarding the proposed project to their detriment.

[*P14] In the present case, the express terms of the letter of intent clearly indicate that that document was nothing more than an agreement to principles which were subject to further negotiation and a definitive written agreement. While the letter of intent may have provided the basic framework for future negotiations, the letter itself did not address all the essential terms of the construction contract. Thus, the letter of intent is not a legally enforceable contract.

Fraud

[*P15] In order to establish a claim for fraud, a party must prove each of the following elements:

> "(a) a representation or, where there is a duty to disclose, concealment of a fact,
>
> "(b) which is material to the transaction at hand,
>
> "(c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,
>
> "(d) with the intent of misleading another into relying upon it,
>
> "(e) justifiable reliance upon the representation or concealment, and
>
> "(f) [**9] a resulting injury proximately caused by the reliance." *Burr v. Bd. Of Commrs. of Stark Cty.* (1986), 23 Ohio St.3d 69, 23 Ohio B. 200, 491 N.E.2d 1101, paragraph two of the syllabus, citing *Cohen v. Lamko, Inc.* (1984), 10 Ohio St.3d 167, 169, 10 Ohio B. 500, 462 N.E.2d 407.

[*P16] An action in fraud will only be found if all of the elements are present and "the absence of one element is fatal to recovery." *Westfield Ins. Co. v. Huls Am., Inc.* (1998), 128 Ohio App.3d 270, 296, 714 N.E.2d 934, citing *Manning v. Len Immke Buick* (1971), 28 Ohio App.2d 203, 205, 276 N.E.2d 253.

[*P17] In her motion for summary judgment, appellee argued that there was no material issue of fact as to whether she had engaged in fraud in her interaction with appellant. To support her argument, appellee presented the deposition testimony of Richard Bender.

[*P18] Appellant did not address the fraud claim in its opposition to appellee's motion for summary judgment and motion for partial summary judgment.

[*P19] This Court finds that appellee met her *Dresher* burden in that she demonstrated that a contract did not exist between the parties and that appellant had no actionable claim for fraud. The burden then [**10] shifted to appellant to show that there existed a genuine issue of material fact as to whether a contract existed or that appellee was liable for fraud. Appellant failed to meet its burden. This Court finds that summary judgment was properly granted in favor of appellee.

[*P20] Appellant's assignment of error is overruled.

III.

[*P21] The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

[**11] Costs taxed to appellant.

Exceptions.

DONNA J. CARR

FOR THE COURT

WHITMORE, J.

BOYLE, J.

CONCUR

LEXSEE

Lloyd and Gyneth Bevins v. Harrison and Madeline King

No. 84-439

Supreme Court of Vermont

147 Vt. 203; 514 A.2d 1044; 1986 Vt. LEXIS 386; 1 U.C.C. Rep. Serv. 2d (Callaghan) 787

June 27, 1986, Opinion filed

PRIOR HISTORY: [***1] **Appeal** by defendants sellers from judgment in favor of plaintiffs purchasers in suit seeking damages for breach of contract and fraud in connection with sale of gasoline station and personal property; plaintiffs cross-appealed from trial court's dismissal of four counts of their complaint. Franklin Superior Court, *Morse*, J., presiding.

DISPOSITION: *Affirmed.*

COUNSEL: *Brown, Cahill & Gawne*, St. Albans, for Plaintiffs-Appellees.

Douglas DeVries, Enosburg Falls, and *Michael Rose*, St. Albans (On the Brief), for Defendants-Appellants.

JUDGES: Hill, Peck, Gibson and Hayes, JJ., and Barney, C.J. (Ret.), Specially Assigned.

OPINION BY: HILL

OPINION

[*204] [**1045] This case comes before us for the second time. Plaintiffs initially filed suit in June 1980 seeking damages for breach of contract and misrepresentations in connection with their purchase of a gasoline station and related personal property from defendants in October 1975. At trial, defendants were not allowed to amend their pleadings to raise the four-year statute of limitations defense applicable to actions brought under Article 2 of the Uniform Commercial Code (UCC). 9A V.S.A. § 2-725. The jury subsequently [***2] returned a verdict for the plaintiffs, and defendants appealed. We reversed on the ground that plaintiffs failed to demonstrate that they would have been prejudiced by the amendment. *Bevins* v. *King*, 143 Vt. 252, 256, 465 A.2d 282, 284 (1983).

On remand, plaintiffs refashioned their pleadings to allege fraud, misrepresentation, and unjust enrichment. Defendants filed a motion to dismiss Counts I, II, III and V of the complaint on the grounds that they were governed by the UCC and barred by the four-year statute of limitations. The trial court granted defendants' motion, relying on *Aube* v. *O'Brien*, 140 Vt. 1, 433 A.2d 298 (1981) (plaintiffs' allegations of fraudulent misrepresentation of the condition of the goods did not take the claims outside the UCC sales contract statute of limitations). It subsequently found for the plaintiffs on Counts IV and VI, and entered judgment on their behalf. Defendants appeal. Plaintiffs cross-appeal the court's dismissal of Counts I, II, III and V. We affirm.

I.

We agree that Counts I, II, III and V of plaintiffs' amended complaint were time-barred under the UCC statute of limitations.

To be sure, a single transaction may [***3] give rise to multiple causes of action; although some may be time-barred, others may not. See *Aube* v. *O'Brien, supra*, 140 Vt. at 2-3, 433 A.2d at 299. In order to create an independent cause of action in fraud, however, the claim must be based on tortious conduct of the seller. See *Z. D. Howard Co.* v. *Cartwright*, 537 P.2d 345, 347 (Okla. 1975). In other words, the fraud must be extraneous to the contract, rather than a fraudulent nonperformance of the contract itself. *Foodtown* v. *Sigma Marketing Systems, Inc.*, 518 F. Supp. 485, 490 [*205] (D.N.J. 1980); *Closed Circuit Corp. of America* v. *Jerrold Electronics Corp.*, 426 F. Supp. 361, 364 (E.D. Pa. 1977).

[**1046] In *Union Bank* v. *Jones*, 138 Vt. 115, 122, 411 A.2d 1338, 1343 (1980), we recognized that principles of contract and principles of fraud must be kept separate and distinct for "[if] every broken promise

were to constitute fraud, . . . the resulting instability would severely impair the conduct of business." See also *Hertz Commercial Leasing Corp.* v. *LMC Data, Inc.*, 73 Misc. 2d 1009, 1013, 343 N.Y.S.2d 689, 694 (Civ. Ct. 1973) ("If a party could simply, by alleging [***4] that a contracting party never intended to fulfill his promise, create a tortious action in fraud, there would be no effective way of preventing almost every contract case from being converted to a tort for jurisdictional purposes.").

We reaffirm this statement and find it to be controlling here. In essence, plaintiffs have attempted to convert what is an action for breach of warranty into an action for fraud by calling defendants' representations misrepresentations of existing fact. Counts I, II, III, and V all focused on the parties' agreement, and the defendants' failure to deliver the goods in the condition warranted. Plaintiffs' cause of action arising thereunder is for breach of contract or breach of warranty under the Uniform Commercial Code, and it is controlled by the Code's four-year statute of limitations. See 9A V.S.A. § 2-725. To hold otherwise would defeat the whole purpose of 9A V.S.A. § 2-725 which is "[to] introduce a uniform statute of limitations for sales contracts . . . ." 9A V.S.A. § 2-725 Uniform Laws Comments; see also *Closed Circuit, supra*, 426 F. Supp. at 364 (A party "cannot remove . . . transactions from the ambit of the Commercial Code to [***5] the area of tortious conduct simply by making general allegations of fraud.").

II.

Defendants contend that, in considering those counts in plaintiffs' complaint sounding in tort, the trial court failed to apply the correct standard of proof and that such failure constitutes reversible error. In making this argument, defendants rely solely on the trial court's failure to state on the record that it applied the clear and convincing standard of proof applicable to actions for fraud. See *Bardill Land & Lumber, Inc.* v. *Davis*, 135 Vt. 81, 370 A.2d 212 (1977).

[*206] The defendants do not contest any of the court's stated findings, and therefore they are binding. *Rule* v. *New Hampshire-Vermont Health Service*, 144 Vt. 323, 325, 477 A.2d 622, 623 (1984). While it is true that a misapplication of the law to unchallenged findings is subject to corrective appellate review, *Bolduc* v. *Coffin*, 133 Vt. 67, 69, 329 A.2d 655, 656 (1974), the party challenging the court's conclusions must overcome the great deference we give to the judgment of the court below. *Vieweger* v. *Clark*, 144 Vt. 630, 632, 481 A.2d 1268, 1270 (1984). On review, we will make all reasonable [***6] inferences in support of the court's judgment. *Id.*

In applying this principle of appellate practice, the Connecticut Supreme Court recently held that it will not assume that the trial court acted incorrectly when the standard of proof is not stated. *State* v. *Thompson*, 197 Conn. 67, 81, 495 A.2d 1054, 1063 (1985) (citation omitted). We refuse to indulge in such assumptions as well. Defendants did not make any reference to the clear and convincing standard of proof in their requests to find, nor did they file a motion to amend the findings. Moreover, they have not pointed to anything in the record which would indicate that the trial court misapprehended this issue. In sum, although we agree that the better practice would be to set forth the applicable standard of proof, failure to do so is not per se reversible error.

Our review of the record here reveals evidence that fairly and reasonably supports the trial court's findings in all respects. Assuming, as we do, that the trial court applied the correct evidentiary standard, these findings adequately support the trial court's determinations on liability. [**1047] See *Lincoln* v. Emerson, 137 Vt. 301, 303, [***7] 404 A.2d 508, 510 (1979) ("it [is] for the trial court to determine whether the evidence in question was clear and convincing"). Thus, we deny defendants' claim of error.

III.

Defendants' final assignment of error is without merit. The pertinent facts are as follows. The trial court permitted plaintiffs to call a late-arriving witness out of order. In the interim, defendants argued a motion to dismiss with the understanding that their argument would not be rebutted by this witness' testimony. This understanding was premised, however, on defendants' representations to the court that their motion would not be affected by testimony [*207] yet to be heard. As defendants' motion related to the condition of the wiring, a subject matter to be addressed by plaintiffs' late-arriving witness, the court allowed this witness to testify in rebuttal.

Vermont Rule of Evidence 611(a) provides that the court has the power to control the introduction and order of evidence. Trial courts are typically afforded broad discretionary latitude in this area. Their decisions will not be disturbed on appeal unless the party can show an abuse of discretion resulting in prejudice. See *State* [***8] v. *Tatko*, 119 Vt. 459, 463-64, 128 A.2d 663, 666 (1957) (Rules governing the conduct of trials do not have the effect of conferring a right of the parties to any established pattern; they yield to the discretion of the trial judge when the circumstances demand it.). Defendants here have not shown that the trial court abused its discretion in allowing plaintiffs' late-arriving witness to rebut their motion to dismiss as they both knew of plaintiffs' intention to call this witness and the purpose of his testimony when they presented such motion to the court.

Affirmed.

LEXSEE

DR. ALAN BRINKMANN , Individually and on behalf of all other physicians similarly situated, Plaintiff-Appellant, vs. ST. PAUL FIRE & MARINE INSURANCE COMPANY, Defendant-Appellee.

No. 6-306 / 05-0744

COURT OF APPEALS OF IOWA

2006 Iowa App. LEXIS 642

June 28, 2006, Filed

NOTICE:

NO DECISION HAS BEEN MADE ON PUBLICATION OF THIS OPINION. THE OPINION IS SUBJECT TO MODIFICATION OR CORRECTION BY THE COURT AND IS NOT FINAL UNIL THE TIME FOR REHEARING OR FURTHER REVIEW HAS PASSED. AN UNPUBLISHED OPINION MAY BE CITED IN A BRIEF; HOWEVER, UNPUBLISHED OPINIONS SHALL NOT CONSTITUTE CONTROLLING LEGAL AUTHORITY.

SUBSEQUENT HISTORY: Reported at Brinkmann v. St. Paul Fire & Marine Ins. Co., 2006 Iowa App. LEXIS 1514 (Iowa Ct. App., June 28, 2006)

PRIOR HISTORY: Appeal from the Iowa District Court for Linn County, L. Vern Robinson, Judge. The plaintiff appeals from the order granting the defendant's motion for summary judgment.

DISPOSITION: AFFIRMED.

COUNSEL: Larry D. Helvey, James P. Craig, and Brenda K. Wallrichs of Moyer & Bergman, P.L.C., Cedar Rapids, for appellants.

Bradley S. Gelder, Michael P. Malakoff, and Erin M. Brady of Malakoff, Doyle & Finberg, Pittsburgh, Pennsylvania, for appellants.

Terri L. Combs and Chad R. Anderson of Faegre & Benson ,L.L.P., Des Moines, for appellee.

Neil J. Dilloff and Cheryl Zak Lardieri of D.L.A. Piper, Rudnick, Gray, Cary U.S., L.L.P., Baltimore, Maryland, for appellee.

Stephen J. Holtman, Cedar Rapids, for appellee.

JUDGES: Heard by Vogel, P.J., and Zimmer and Vaitheswaran, JJ.

OPINION BY: VOGEL

OPINION

VOGEL, P.J.

The plaintiff in this class action suit appeals from the district court [*2] order granting the defendant's motion for summary judgment. We affirm.

Background Facts and Proceedings.

On December 12, 2001, St. Paul Fire & Marine Insurance Company (St. Paul), notified the Iowa Insurance Commissioner that it was seeking to sell its medical malpractice business and that it would no longer be writing such policies. Accordingly, St. Paul informed its insureds that it would not renew their policies. Dr. Alan Brinkmann, who had purchased medical malpractice insurance through St. Paul for over twenty years and had purchased his final policy on August 1, 2001, was informed that his policy would expire on August 1, 2002.

The policy of Brinkmann, representative of the class of plaintiffs, was a "claims made" policy whereby claims that accrued and were reported to St. Paul during the policy period were covered. However claims that accrued during the policy period but that were reported after the policy expired were not covered. To protect against this situation, St. Paul gave Brinkmann the option to purchase additional coverage, termed an "Optional Reporting Endorsement" or "tail coverage," which extends the time in which to report claims beyond the term of [*3] the policy. For no additional premium, St.

Paul's policy provided "Death, Disability and Retirement" (DDR) coverage if the insured (a) died, (b) became disabled, or (c) retired during the policy period.

The annual premium charged by St. Paul included a separate component funding its tail coverage. Of this premium component, a portion funded coverage during the current policy year, while a portion pre-funded coverage to be extended in future policy years. This method, recommended by the National Association of Insurance Commissioners (NAIC) and known as "level funding," calls for an insurer to charge premiums higher than those necessary to fund DDR coverage for only the current policy year. [1] NAIC also recommends that the additional premiums, which pre-fund future DDR coverage, be held in reserve and classified as an "unearned" premium reserve.

1 There is no evidence that this level funding internal accounting procedure was in any way made an explicit part of the policy, nor that it was relied upon or even known by Dr. Brinkmann when he purchased the policy.

[*4] In 2001, St. Paul held $ 47,670,628 in its extended loss and expense reserve. Of that portion, $ 2,406,370 was held to pre-fund DDR coverage for Iowa policy holders. When St. Paul decided to exit the medical malpractice field, this of course reduced both its liability to provide future DDR coverage and the reserves necessary to fund DDR coverage in future years. St. Paul's non-renewals, according to Brinkmann, "generated a huge windfall profit for itself."

On November 20, 2003, Dr. Alan Brinkmann [2], as representative of a class of similarly situated Iowa physicians, filed a class action petition against St. Paul. The petition alleged each class member had purchased medical malpractice insurance policies through St. Paul. Brinkmann did not claim breach of contract but rather that the company was unjustly enriched when it did not renew its medical malpractice policies as they expired, and did not refund the portion of the premium attributable to pre-funded DDR coverage. During discovery, Brinkmann gathered information that following St. Paul's non-renewals, its extended loss and reserve report decreased by nearly $ 33,000,000, which St. Paul admitted was in part attributable to its [*5] decision to discontinue renewing medical malpractice policies.

2 Dr. Donald Linder originally was a named plaintiff, but was subsequently dismissed because he had voluntarily cancelled his policy in September 2001.

The case was removed to federal court and later remanded to the Iowa District Court, after it was determined the jurisdictional threshold was uncertain. On October 6, 2004, St. Paul filed a motion to dismiss or, in the alternative, a motion for summary judgment. It argued, in pertinent part that, lacking any basis on which to bring a breach of contract claim, Brinkmann impermissibly attempted to circumvent the clear and unambiguous contractual language by bringing an unjust enrichment claim. The court granted the motion for summary judgment, concluding the unjust enrichment claim is barred by the existence of the parties' express contract. Brinkmann appeals from this ruling.

Scope and Standards of Review.

We review a ruling on a motion for summary judgment for correction of errors at [*6] law. Iowa R. App. P. 6.4. Summary judgment is appropriate under Iowa Rule of Civil Procedure 1.981 only when no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. *City of West Branch v. Miller,* 546 N.W.2d 598, 600 (Iowa 1996). We examine the record before the district court to decide whether a genuine issue of material fact exists and whether the court correctly applied the law. *Gerst v. Marshall,* 549 N.W.2d 810, 811-12 (Iowa 1996). In doing so, we view the facts in the light most favorable to the party opposing the motion for summary judgment. *Id.*

Unjust Enrichment.

The court granted summary judgment essentially on two separate, yet related, grounds. First, it held that the parties' express contract governs this dispute and bars the unjust enrichment claim as a matter of law. *Chariton Feed & Grain, Inc.v. Harder*, 369 N.W.2d 777, 791 (Iowa 1985). Second, it ruled that the express language of the policy plainly made Brinkmann ineligible for DDR coverage. On appeal, Brinkmann contends the policy does not bar the [*7] unjust enrichment claim. He posits that the policy does not cover the specific instance of the disposition of "unearned" premiums upon across-the-board non-renewal by St. Paul, and is thus subject to an unjust enrichment claim.

The doctrine of unjust enrichment is based on the principle that a party should not be unjustly enriched at the expense of another or receive property or benefits without paying just compensation. *Credit Bureau Enters., Inc. v. Pelo,* 608 N.W.2d 20, 25 (Iowa 2000). Although it is referred to as a quasi-contract theory, the doctrine of unjust enrichment is equitable, not contractual, in nature. *See Iowa Waste Sys., Inc. v. Buchanan County,* 617 N.W.2d 23, 29 (Iowa Ct. App. 2000). The doctrine of unjust enrichment serves as a ground for the remedy of restitution. *See Smith v.*

Harrison, 325 N.W.2d 92, 94 (Iowa 1982). It has application in cases arising from contracts, torts or other predicate wrongs, and may serve as an independent ground for restitution in the absence of mistake, wrongdoing, or breach of contract. *Id.*

One asserting a claim of unjust enrichment must establish three propositions: (1) defendant [*8] was enriched by the receipt of a benefit, (2) the enrichment was at the expense of the plaintiff, and (3) it is unjust to allow the defendant to retain the benefit under the circumstances. *State v. Unisys,* 637 N.W.2d 142, 154-55 (Iowa 2001). However, a plaintiff cannot recover on an implied contract or unjust enrichment when the alleged damages arise from a matter covered by an express written contract. *Chariton Feed & Grain,* 369 N.W.2d at 791. Thus, generally the existence of a contract precludes the application of the doctrine of unjust enrichment, *Smith v. Harrison,* 325 N.W.2d 92, 94 (Iowa 1982) (citing 66 Am. Jur. 2d *Restitution and Implied Contracts* § 6, at 949 (1973)), but there may be an implied contract on a point not covered by an express one. *Olberding Constr. Co. v. Ruden*, 243 N.W.2d 872, 875 (Iowa 1976).

The insurance policy in question here provides both for cancellation and non-renewal of a contract. By the terms of the policy, a cancellation occurs when either St. Paul or the insured terminates the policy before the end of the policy period. Conversely, a non-renewal [*9] occurs when either party chooses to not renew at the end of the policy period. In this case, we are dealing with the non-renewal of the plaintiffs' medical malpractice policies.

As noted previously, the policy clearly provides St. Paul the prerogative of non-renewal, an option it chose to exercise. Under the policy, an insured is only entitled to tail coverage with no additional premium upon the occurrence of one of three conditions: death, total disability, or retirement within the policy year. Admittedly, Brinkmann satisfied none of those conditions. Nor does he dispute St. Paul's right of non-renewal. In examining an insurance policy, we will not "write a new contract of insurance between the parties" where there is no ambiguity. *Stover v. State Farm Mutual Ins. Co.*, 189 N.W.2d 588, 591 (Iowa 1971). We avoid straining the words and phrases of the policy "to impose liability that was not intended and was not purchased." *State Farm Auto Insurance Co. v. Malcolm*, 259 N.W.2d 833, 835 (Iowa 1977).

While the policy does address the disposition of unearned premiums upon cancellation, it does not expressly detail the treatment of the premiums on the event [*10] of non-renewal. As the district court noted, Brinkmann argues the same approach requiring refund upon cancellation by one party should be applied to the non-renewal situation. Like the district court, we disagree. A non-renewal necessarily occurs at the end of the policy period, and the policy clearly stated St. Paul retained the right to non-renew the policy. Thus, the insured has received all the coverage for which he bargained. In other words, the insured contracted for a certain period of coverage and received full coverage for that term. We further agree with St. Paul's position because, regardless of whether St. Paul's internal accounting terminology deemed something "unearned," the contract was fully performed, provided Brinkmann with full risk coverage, including the potential for "tail" coverage, had a triggering event occurred during the term of the policy. It expired and coverage ended, according to its agreed upon terms. Therefore, there are no "unearned" premiums in the non-renewal context. Finally, we find significant Brinkmann's position that had St. Paul simply decided to not renew his policy alone, he would have no cause of action. He is unable to provide any authority [*11] for the proposition that a class of plaintiffs may maintain a cause of action that would not have been viable had it been brought by its individual members.

Conclusion.

It appears to us Brinkmann is simply seeking a benefit, or a guaranteed refund of payments, that clearly is outside of the policy, unless it is judicially rewritten. We decline to supply additional terms. Accordingly, because we agree with the district court that an integrated insurance policy governing the full breadth of the parties' relationship exists, there can be no recovery under a claim of unjust enrichment. *See Bethea v. St. Paul Guardian Ins. Co.*, 376 F.3d 399, 408 (5th Cir. 2004) (concluding Louisiana law barred plaintiffs' unjust enrichment claim after St. Paul chose to exit the medical malpractice business). The order granting summary judgment to St. Paul is therefore affirmed.

AFFIRMED.

LEXSEE

CARRIE CANTY, AS ADMINISTRATRIX AD PROSEQUENDUM OF THE ESTATE OF JOSEPH CANTY, CARRIE CANTY, INDIVIDUALLY, AND SAMUEL CANTY, PLAINTIFFS, v. EVER-LAST SUPPLY CO., HARVESTER CHEMICAL CO., INC. (A/K/A HARVESTER CHEMICALS INC.), CARY DORSI AND AKZO NOBEL COATING INC., DEFENDANTS.

DKT. NO. ESX-L-1586-94

SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ESSEX COUNTY

296 N.J. Super. 68; 685 A.2d 1365; 1996 N.J. Super. LEXIS 440

July 9, 1996, Decided

SUBSEQUENT HISTORY: [***1] Approved for Publication November 12, 1996.

COUNSEL: *Marc S. Klein,* for plaintiffs (*Sills, Cummis, Zuckerman, Tischman, Epstein & Gross,* attorneys).

Paul A. Spina, for defendant, Harvester Chemical Co., Inc., (*Paul Seligman,* attorneys).

Lee Henig-Elona, for defendant, Akzo Nobel Coating Inc. (*Hannoch & Weisman,* attorneys).

Stephen L. Hopkins, for defendant, Ever-Last Supply Co., (*Braff, Harris & Sukonek,* attorneys).

David L. Wikstrom, for defendant, Cary Dorsi (*Morgan, Melhuish, Monaghan, Arvidson, Abrutyn & Lisowski,* attorneys).

JUDGES: JULIO M. FUENTES, J.S.C.

OPINION BY: JULIO M. FUENTES

OPINION

[*73] [**1367] JULIO M. FUENTES, J.S.C.

In August 1993, plaintiff Joseph Canty was killed and his son, Samuel, was severely injured when vapors from a lacquer floor sealant they had applied to a hardwood floor suddenly burst into flames. Plaintiffs commenced this wrongful death and personal injury action contending that the accident [**1368] and plaintiffs' injuries were caused by defendants' failure to provide adequate warnings or instructions on the lacquer product.

The primary issue in this summary judgment motion is whether [***2] plaintiffs' defective warning claims are preempted by the Federal Hazardous Substances Act (FHSA), 15 U.S.C.A. §§ 1261-1278. Defendants assert that preemption applies and that because the label on the lacquer product fully complies with the applicable federal labeling statutes, plaintiffs' action must be dismissed. For the reasons that follow, I conclude that the FHSA preempts plaintiffs' defective warning claims and that defendants' Lacquer Seal product complies with the labeling requirements of the FHSA. An order granting summary judgment is entered accordingly.

I

The relevant facts are summarized from the evidential materials presented. For over thirty years, Joseph Canty operated a hardwood floor refinishing business with his son, Samuel Canty. In early August 1993, the two were hired to refinish the hardwood floors in defendant Cary Dorsi's apartment building in Upper Montclair. To prepare for the job, Joseph Canty purchased several cans of Lacquer Seal from defendant Ever-Last Supply Co. (Ever-Last), a retail supplier of janitorial and maintenance supplies in Newark. On the date of the fire, the Cantys appeared at Dorsi's apartment building to refinish the floors in six [***3] separate apartment units. Prior to commencing, as part of their normal [*74] routine, Samuel Canty read the warning label on one of the cans of Lacquer Seal to his father, who was illiterate. After the two had finished applying a coat of sealant in one of the apartments, the sealant's vapors, which had collected throughout the unit, ignited while the two were still inside. The resulting flash fire killed Joseph Canty and seriously injured Samuel. The fire erupted when either the compressor in the apartment's refrigerator switched on, creating a spark which ignited the vapors, or the vapors were ignited by a pilot light in the apartment's gas stove.

The lacquer used by the Cantys is a product manufactured by defendant Akzo Nobel Coatings (Akzo) for use with hardwood floors as a protective sealant. It is composed of a number of highly flammable chemicals, including toluene, isopropanol, and ethyl acetate. The product itself is particularly combustible. One of the primary dangers it presents is the possibility that during application its vapors will collect and suddenly ignite, resulting in the sort of flash fire that injured the plaintiffs in this case.

Akzo manufactures the Lacquer Seal [***4] in bulk and ships the product in tankloads to defendant Harvester Chemicals (Harvester). Harvester then repackages the Lacquer Seal into one and five gallon containers which it labels with precautionary language before distributing to the next level of suppliers. Defendant Ever-Last purchases its stock of Lacquer Seal from Harvester and offers the product to its customers, which include tradespeople and the general public alike.

The lettering on the face panel of the Lacquer Seal label is red on a white background and appears in varying degrees of height and boldness. In the center of the label appear the phrases *"DANGER!"* "EXTREMELY FLAMMABLE" and "VAPORS MAY CAUSE FLASH FIRE." Below these phrases is a sentence directing the user to read the can's other panels, which contain additional warnings: "VAPOR HARMFUL," "PREVENT BUILD-UP OF VAPORS," "VAPORS MAY IGNITE EXPLOSIVELY," and "VAPOR IS HEAVIER THAN AIR-VAPORS MAY TRAVEL TO OTHER THAN WORK AREA."

[*75] The back of the can contains two smaller labels, each with white lettering on a bright red background. The top label contains the phrases "DANGER!" "EXTREMELY FLAMMABLE," "VAPORS MAY CAUSE FLASH FIRE," and "VAPORS MAY TRAVEL TO OTHER THAN [***5] WORK AREA." The bottom label depicts the symbol of a flame and the phrase "FLAMMABLE LIQUID" written in bold typeface, three-eighths of an inch high, underneath the flame.

[**1369] Plaintiffs' expert, Stephen Kuzma, submitted a report in which he claims that the warnings on the Lacquer Seal label were "poorly organized" and that the statements of principal hazard on the face panel do not appear in the same size or degree of boldness. Kuzma also found that the label did not provide adequate information about the flammable nature of Lacquer Seal vapors or the kinds of precautions that users should take concerning how to properly ventilate rooms before using the product. In Kuzma's opinion, the label on the Lacquer Seal can:

> presents a cluttered and jumbled array of warnings in a poorly organized fashion that is difficult to understand, obscures or renders some warnings and precautionary measures inconspicuous, provides misleading information and fails to define key terms clearly and effectively. As a result, this labeling inadequately warns consumers of the full extent of the dangers associated with lacquer seal and the extensive precautions necessary to protect themselves from these [***6] dangers.

A defense expert, E. Patrick McGuire, stated in his report that the label in question contains conspicuous warnings and detailed instructions in the appropriate type size. He concluded that "defendant met its obligation to warn the plaintiffs on the hazards associated with the ordinary and expected use of this product" and that the label is in compliance with the applicable federal statute.

Plaintiffs' primary contention is that defendants Akzo, Harvester, and Ever-Last are liable under the doctrine of strict product liability for failing to provide adequate warnings of the dangers or instructions on the safe use of the product. *See* New Jersey Products Liability Act, *N.J.S.A.* 2A:58C-1 to -11. Plaintiffs additionally claim that the defendants are liable in negligence for [*76] failing to adequately warn and instruct plaintiffs of the dangers associated with the use of Lacquer Seal.

Defendant Akzo, joined by Harvester and Ever-Last, now moves for summary judgment, contending that (1) Lacquer Seal falls within a class of products subject to the labeling requirements of the FHSA; (2) the Lacquer Seal label complies with FHSA requirements; and (3) compliance with the federal [***7] statute preempts plaintiffs' state law damages action, whether it be based on statutory or common law. [1]

> 1 Defendant Akzo settled with plaintiffs pending the court's ruling on this motion and is no longer a party to this action. The claims against Dorsi have been dismissed on other grounds.

II

The preliminary issue in this motion is whether the FHSA governs the lacquer product used by plaintiffs at the time of the fire. Only where the federal statute applies to a given product does preemption become an issue. The parties agree that Lacquer Seal is a "hazardous substance" as defined by § 1261(f) of the statute. However, only hazardous substances which are "intended, or packaged in a form suitable, for use in the household or by children" are subject to the labeling requirements of the Act. 15 *U.S.C.A.* § 1261(p). Hazardous substances intended for household use which fail to comply with the federal labeling requirements are deemed "misbranded," and the introduction of such an item into interstate commerce [***8] is prohibited. *See* 15 *U.S.C.A.* § 1263(a).

Plaintiffs contend, however, that Lacquer Seal is a professional product sold primarily to tradespeople and that it therefore is not a product intended for household use. According to plaintiffs, the controlling factor on this issue is the manufacturer's intended use of the product. They argue that products that are developed and marketed for use by professionals do not require the FHSA's protective measures which were designed in part to help prevent [*77] accidents involving children. *See Barnes v. Litton Indus. Prods.,* 409 F. Supp. 1353, 1361 (E.D.Va.1976),*aff'd in part, rev'd in part on other grounds,* 555 F.2d 1184 (4th Cir.1977). Plaintiffs further assert that by labeling the lacquer container "For Professional Use Only," the defendants intended the product for industrial application, not household use; thus, Lacquer Seal [**1370] would not be covered by the FHSA. *See Christenson v. St. Mary's Hosp.,* 835 F. Supp. 498, 502 (D.Minn.1993) (cleaner designed for hospital use was not within scope of FHSA); *Barnes, supra,* 409 F. Supp. at 1363 (burning alcohol intended for use by dentists not household product regulated [***9] by FHSA).

The manufacturer or the distributor's intended use, however, is not the correct standard for determining whether a product is subject to the federal labeling statutes. The appropriate test is found at 16 *C.F.R.* § 1500.3(c)(10)(i), which defines the phrase "intended, or packaged in a form suitable, for use in the household" to include:

> any hazardous substance, whether or not packaged, that under any customary or reasonably foreseeable condition of purchase, storage, or use may be brought into or around a house, apartment, or other place where people dwell, or in or around any related building or shed including, but not limited to, a garage, carport, barn, or storage shed. The term includes articles, such as polishes or cleaners, designed primarily for professional use but which are available in retail stores, such as hobby shops, for nonprofessional use. Also included are items, such as antifreeze and radiator cleaners, that although principally for car use may be stored in or around dwelling places. The term does not include industrial supplies that might be taken into a home by a serviceman. An article labeled as, and marketed solely for, industrial use does [***10] not become subject to this act because of the possibility that an industrial worker may take a supply for his own use. Size of unit or container is not the only index of whether the article is suitable for use in or around the household; *the test shall be whether under any reasonably foreseeable condition of purchase, storage, or use the article may be found in or around a dwelling.*
>
> [16 *C.F.R.* § 1500.3(c)(10)(i) (emphasis added).]

Reading the section as a whole, the test is not what the manufacturer intends, but whether it is reasonably foreseeable to the manufacturer that the product will be available for household use. *See Barnes, supra,* 409 F. Supp. at 1359. Under the appropriate test, the focus is whether the product, through its normal distribution scheme, is made available to the ordinary consumer. The fact [*78] that the defendants' product is labeled "For Professional Use Only," does not determine the issue. The important consideration is whether the product could be purchased by the average consumer for household use.

The cases cited by plaintiffs in support of their contention that the lacquer used by the Cantys was not a household product covered by [***11] the FHSA are inapposite. *See Christenson, supra,* 835 F. Supp. at 502; *Barnes, supra,* 409 F. Supp. at 1359.

In *Christenson,* a five-year-old was injured when she drank Liquiset, a specialized cleaner used to sanitize medical supplies. The court found Liquiset to be a professional product that was not covered by the FHSA because it was sold only to hospitals and because its highly specialized application made it unlikely that the product could be adapted to household use. In *Barnes,* an inmate at a state prison suffered personal injuries after consuming burning alcohol labeled "For Professional Dental Use Only." In holding that the FHSA did not apply, the court specifically noted that burning alcohol, which is used to fuel bunsen burners and melt wax, was not a product ordinarily found in the home and that the seller had taken careful steps to prevent sales of the alcohol to anyone but dentists and dental laboratories. *See* Barnes, supra, 409 F. Supp. at 1359. In both *Barnes* and *Christenson,* the plaintiffs' personal injury claims escaped FHSA preemption because the products involved had highly specialized industrial applications which limited their distribution [***12] to professional users and made their use by the average household consumer not reasonably foreseeable.

In this case, the evidence reveals that Ever-Last, one of the stores where Lacquer [**1371] Seal is sold, is open to the general public as well as tradespeople. Any Ever-Last customer, whether a professional or not, may purchase Lacquer Seal for household use. Where, as here, there is no evidence to show that the manufacturer, wholesaler, or retailer of a hazardous substance sought to limit sales of the product to industrial or professional users, it is reasonably foreseeable that household consumers will [*79] have access to the product. The lack of restrictions on who may purchase Lacquer Seal, along with its obvious utility to an average household consumer as a wood floor sealant make it a product "intended, or packaged in a form suitable, for use in the household" within the meaning of the regulations. Accordingly, Lacquer Seal is a product governed by FHSA.

III

In their complaint, plaintiffs assert two separate theories of recovery, negligence and strict products liability. In regard to the negligence claim, plaintiffs assert that defendants "had a duty to properly design the [Lacquer Seal [***13] label] and to warn the plaintiffs of the dangers associated with the [use of the product]." Plaintiffs contend that defendants breached this duty of care by failing to provide "adequate warnings or instructions" and, as a proximate result of this breach, plaintiffs sustained severe injuries.

Plaintiffs' common law negligence claim must be dismissed because it is superseded by state legislation. With the enactment of the Product Liability Act, *N.J.S.A.* 2A:58C-1 to -11, effective July 22, 1987, virtually all common law tort claims in New Jersey were combined into a single theory of recovery. Passage of the Act signaled the intention of the Legislature to replace common law negligence theories in the product liability area with a statutorily defined cause of action. As the Appellate Division recently observed in *Tirrell v. Navistar Int'l, Inc.,* 248 N.J. Super. 390, 398-99, 591 A.2d 643 (App.Div.), *certif. denied,* 126 N.J. 390, 599 A.2d 166 (1991):

> [W]here the Product Liability Act conflicts with the common law, it governs [the] action. The Product Liability Act no longer recognizes negligence or breach of warranty (with the exception of an express warranty) as a viable [***14] separate claim for "harm" (as defined in the Act) caused by a defective product.
>
> . . . .
>
> Since a product liability action encompasses *"any* claim or action brought by a claimant for harm caused by a product," *N.J.S.A.* 2A:58C-1, (emphasis added), and section 2 describes the sole method of proof, namely that recognized for strict [*80] liability claims, it is clear that common-law actions for negligence or breach of warranties (except express warranties) are subsumed within the new statutory cause of action, if the claimant and harm also fall within the definitional limitations of section 1.
>
> [*Ibid.*]

See also *Repola v. Morbark Indus., Inc.,* 934 F.2d 483, 488-89 (3d Cir.1991); *Ramos v. Silent Hoist & Crane Co.,* 256 N.J. Super. 467, 473, 607 A.2d 667 (App.Div.1992); *Koster v. Scotch Assocs.,* 273 N.J. Super. 102, 110 n. 1, 640 A.2d 1225 (Law Div.1993); William Dreier et al., *New Jersey Products Liability & Toxic Torts Law* 1-10 (1996). Thus, here, plaintiffs' common law negligence claims must be dismissed as being pled in violation of the Product Liability Act's single cause of action rule.

I now turn to whether plaintiffs' strict liability claim [***15] under the Products Liability Act is preempted by the FHSA. *See* *N.J.S.A.* 2A:58C-4. The basis for federal preemption of state law rests within the Supremacy Clause of the Constitution. *Dewey v. R.J. Reynolds Tobacco Co.,* 121 N.J. 69, 77, 577 A.2d 1239 (1990). The clause provides that federal law is the "supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *U.S. Const.,* art. VI, cl. 2. State law may be preempted by valid federal statutes [**1372] or regulations, and this preemption applies equally to state common law and statutory law. *Feldman v. Lederle Lab.,* 125 N.J. 117, 134, 592 A.2d 1176 (1991),*cert. denied,* 505 U.S. 1219, 112 S. Ct. 3027, 120 L. Ed. 2d 898 (1992).

Whether a federal statute preempts state law turns on the intent of Congress when it passed the law, and that intention may be either express or implied. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 2617, 120 L. Ed. 2d 407, 422-23 (1992). As stated by the Supreme Court, "'[t]he purpose of Congress is the ultimate touchstone' of pre-emptive analysis." *Ibid.* (quoting [***16] *Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn,* 375 U.S. 96, 103, 84 S. Ct. 219, 223, 11 L. Ed. 2d 179, 184 (1963)). There must be a clear showing of Congressional intent to supersede state authority, because there is a strong presumption against preemption. [*81] *See id.* at 523, 112 S.Ct. at 2621. In this case, because plaintiffs' claims "concern rights and remedies traditionally defined solely by state law, namely, tort compensation," defendant must clearly establish that Congress intended to preempt this area of tort law. *Feldman, supra*, 125 N.J. at 137, 592 A.2d 1176.

In *Moss v. Parks Corp.*, 985 F.2d 736, 739 (4th Cir.), *cert. denied,* 509 U.S. 906, 113 S. Ct. 2999, 125 L. Ed. 2d 693 (1993), the Fourth Circuit examined Congress' intent in passing the FHSA and set forth the relevant history of the statute's limited preemption provision:

> The FHSA was enacted in 1960. The purpose of the law was to "provide nationally uniform requirements for adequate cautionary labeling of packages of hazardous substances which are sold in interstate commerce and are intended or suitable for household use." As enacted, the FHSA did not contain a preemption section. However, when the Act was amended in 1966, the [***17] legislative history discussed the impracticality of having the states produce potentially fifty different labels for a particular hazardous substance. Congress recommended "a limited preemption amendment which would encourage and permit states to adopt requirements identical with the federal requirements for substances subject to the Federal Act, and to enforce them to complement Federal enforcement."
>
> [*Ibid.* (citations omitted).]

In enacting the preemption provision, Congress was clearly concerned about the possibility that different labeling standards would be adopted by the States, creating multiple requirements for the same hazardous product. As noted by the Ninth Circuit:

> On the one hand, a national safety standard would ease the burden of compliance for chemical product manufacturers by relieving them from the burden of complying with fifty-one separate regulatory schemes promulgated by each state and the federal government. On the other had, such a standard would take police powers away from the states who best know how to serve the interests of their citizenry. The preemption clause in FHSA balances these competing concerns by leaving cautionary labeling requirements [***18] to the federal government while allowing states to regulate the sale and use of hazardous chemicals.
>
> [*Chemical Specialties Mfrs. Ass'n v. Allenby,* 958 F.2d 941, 950 (9th Cir.), *cert. denied,* 506 U.S. 825, 113 S. Ct. 80, 121 L. Ed. 2d 44 (1992).]

The preemption provision that was added under the 1966 Amendments provides that:

> [I]f a hazardous substance or its packaging is subject to a cautionary labeling requirement under [the FHSA] designed to protect against a risk of illness or injury associated with the substance, no State or political subdivision of a State [*82] may establish or continue in effect a cautionary labeling requirement applicable to such substance or packaging and designed to protect against the same risk of illness or injury unless such cautionary labeling requirement is identical to the labeling requirement under [the FHSA].
>
> [**1373] [15 *U.S.C.A.* § 1261, Historical Note, Effect upon Federal and State Law.]

The history and purpose of the limited preemption provision make clear that Congress intended to preempt all state laws which establish cautionary labeling requirements different from those established by the FHSA. *Moss,* [***19] *supra,* 985 F.2d at 739; *Lee v. Boyle-Midway Household Prods., Inc.,* 792 F. Supp. 1001, 1007 (W.D.Pa.1992).

The more precise issue now is whether plaintiffs' strict liability claim constitutes a state law "labeling requirement" subject to preemption by the federal statute. Plaintiffs cite two cases in support of the proposition that the federal labeling statutes do not preempt their state law claims. *See* *Feldman, supra,* 125 N.J. at 155-56, 592 A.2d 1176 (Federal Food, Drug, and Cosmetic Act did not preempt strict liability claim against manufacturer for failure to warn that Declomycin, an antibiotic, could cause tooth discoloration); *Dewey*, *supra*, 121 N.J. at 69, 577 A.2d 1239 (Federal Cigarette Labeling and Advertising Act did not preempt product liability claim for failure to warn of hazardous nature of tobacco product).

The issue of whether the FHSA preempts state law tort actions has been addressed by a number of federal courts. In considering the extent of FHSA preemption in *Moss*, *supra*, 985 F.2d at 736, the Fourth Circuit noted a previous decision where it had stated that:

> [if] federal law mandates a specific label and permits nothing additional or different, it [***20] can hardly be urged that a state tort duty based on a warning requirement that is more elaborate and different does not conflict. The manufacturer in that case cannot comply with both.
>
> [*Worm v. American Cyanamid Co.,* 970 F.2d 1301, 1307 (4th Cir.1992).]

As another Federal Court observed:

> [a] jury verdict or Court decision ruling that compliance with the labeling requirements of the FHSA does not provide sufficient warning under state law would frustrate the congressional purpose of providing nationally uniform requirements.
>
> [*Lee*, *supra*, 792 F. Supp. at 1008.]

[*83] In *Cipollone*, *supra*, the United States Supreme Court considered the preemption of state law tort actions under a provision of the Federal Cigarette Labeling and Advertising Act of 1965 which also prohibited certain inconsistent state law Labeling requirements. In a plurality opinion, the Court held that for purposes of preemption, the distinction between a statutory labeling standard and a failure to warn negligence claim is illusory. The Court then concluded that petitioner's failure to warn tort claim was a labeling "requirement" and thus was preempted to the extent that the claim [***21] required additional or more clearly stated warnings than the federal statute.

In reaching its decision, the *Cipollone* Court noted *Dewey*, supra, where the New Jersey Supreme Court had previously distinguished state law damage claims from "labeling requirements" on the basis of damage claims providing an incentive only to change labels, but not compelling compliance by a manufacturer. *See* *Cipollone,* 505 U.S. at 509 n. 3, 112 S. Ct. at 2613 n. 3; *Dewey*, *supra*, 121 N.J. at 90-91, 577 A.2d 1239. However, as the *Cipollone* Court stated, "[I]t is the essence of the common law to enforce duties that are either affirmative *requirements* or negative *prohibitions*." *Cipollone*, *supra*, 505 U.S. at 522, 112 S. Ct. at 2620. Given the clear import of the *Cipollone* decision, most distinctions "between State statutes and regulations on the one hand and State damage actions on the other for purposes of [federal] preemption" no longer seem relevant. *Macrie v. SDS Biotech Corp.,* 267 N.J. Super. 34, 46-47 n. 4, 630 A.2d 805 (App.Div.), *certif. denied,* 134 N.J. 565, 636 A.2d 522 (1993).

Plaintiffs' contention, based on *Dewey* and *Feldman,* that failure to warn tort actions are not preemptable because they are not [***22] a "labeling requirement", is not in accord with the great weight of state and federal authority. *See* *Cipollone*, *supra*, 505 U.S. at 517-24, 112 S. Ct. at 2618-22; *Moss*, *supra*, 985 F.2d at 739-40; *Lee*, *supra*, 792 F. Supp. at 1006-08; *Salazar v. Whink Prods. Co.,* 881 P.2d 431, 433-34 (Colo.App.1994), *cert. denied*, 514 U.S. 1004, [*84] 115 S. Ct. 1315, 131 L. Ed. 2d 196 (1995); *Busch v. Graphic Color Corp.,* 169 Ill. 2d 325, 662 N.E.2d 397, 408, 214 Ill. Dec. 831, 842, *cert. denied*, 519 U.S. 810, 117 S. Ct. 55, 136 L. Ed. 2d 18 (1996); *Wallace v. Parks Corp.,* 212 A.D.2d 132, 629 N.Y.S.2d 570, 576 (App.Div.1995); *State v. Seier,* 871 S.W.2d 611, 613 (Mo.App.1994).

As was the case in *Cipollone,* the FHSA's prohibition against state law labeling requirements applies only to the extent that those requirements are not identical to the federal statute. The New Jersey Product Liability Act does not impose specific labeling requirements. Rather, it requires labels which "a reasonably prudent person in the same or similar circumstances would have provided with respect to the danger and that communicate[] adequate information on the dangers and safe use of the [***23] product."

N.J.S.A. 2A:58C-4. Thus, whether a claim under the Product Liability Act is preempted because the "labeling requirement" it seeks to impose is not "identical" to the FHSA turns on the specific claims of each action. [**1374] *See* *Cipollone, supra*, 505 U.S. at 523-24, 112 S. Ct. at 2621-22. Where a plaintiff's claim seeks to hold a manufacturer responsible for failing to provide warning labels which are not identical to those required under the FHSA, that claim is preempted. *See, e.g.*, *Moss, supra*, 985 F.2d at 740. Where a plaintiff's claim does not seek more elaborate labeling requirements, but rather is based upon an alleged failure to comply with the FHSA, such a claim would not impose a "labeling requirement" and would not be preempted. In this case, plaintiffs' tort claim under the Product Liability Act is preempted because it seeks warnings and instructions that are more elaborate or more extensive than those required under the FHSA.

Federal courts are divided over whether a failure to warn claim may be brought for non-compliance with the FHSA's labeling requirements. Courts that have considered this issue in the context of the FHSA have found that because the limited preemption provision [***24] only bars state claims that seek to impose labeling requirements which are different from the federal regulations, [*85] claims based on a violation of the federal standards should be permitted. *Moss, supra*, 985 F.2d at 740-41; *see also* *Worm, supra*, 970 F.2d at 1308 (discussing the validity of such a claim under FIFRA); *De-Haan v. Whink Prods. Co.*, 1994 U.S. Dist. LEXIS 650, 1994 WL 24322 (N.D.Ill. Jan. 26, 1994); *Wallace, supra*, 629 N.Y.S.2d at 576; *Jenkins v. James B. Day & Co.*, 69 Ohio St. 3d 541, 1994 Ohio 63, 634 N.E.2d 998, 1003 (1994).

Other courts interpreting analogous preemption provisions have rejected the existence of such a cause of action. *Miller v. E.I. Du Pont de Nemours & Co.*, 880 F. Supp. 474 (S.D.Miss.1994) (interpreting FIFRA); *Rodriguez v. American Cyanamid Co.*, 858 F. Supp. 127, 129-31 (D.Ariz.1994) (construing FIFRA); *Christenson, supra*, 835 F. Supp. at 501 (interpreting FHSA).

The weight of authority compels me to conclude that in this case, a failure to warn claim may be brought for non-compliance with the FHSA's labeling provisions. In *Wallace, supra*, plaintiff was injured in a fire when a camping stove fuel tank exploded while being refilled. [***25] Defendants moved to dismiss plaintiffs' mislabeling and failure to warn claims arguing that the claims were preempted by the FHSA. Plaintiffs, in turn, moved to amend the complaint to allege that the fuel container was "misbranded" under the FHSA. The New York Appellate Court set forth a persuasive and convincing rationale for bringing a suit under state law based upona violation of the FHSA:

> In light of the intention of Congress to preempt State actions only to the limited extent that they impose additional or different labeling requirements than those imposed under Federal law, there would appear to be no constitutional or policy reason to preclude a State action in negligence that is based upon a violation of the Federal labeling standards.
>
> [629 N.Y.S.2d at 576.]

[**1375] Similarly, in *Moss, supra*, the Fourth Circuit held that:

> [S]o long as a plaintiff charges a manufacturer with violations of FHSA-mandated labeling requirements and does not seek more stringent labeling requirements, the Plaintiff's common law tort action for damages is not preempted.
>
> [*Moss, supra*, 985 F.2d at 740-41.]

[*86] The ability to maintain a cause of action based on the failure [***26] to comply with the FHSA is reasonable; otherwise, there would be no redress for harm caused by inadequately labeled products regulated by the federal statute.

In this case, plaintiffs did not specifically plead a violation of the FHSA in their Fourth Amended Complaint. However, the question of defendants' compliance with the Act's labeling requirements was argued at great length by both parties in their submissions to the court. Furthermore, both parties' experts submitted affidavits which addressed the issue of whether defendants' label complied with the FHSA standards. Here, the complaint, together with the expert reports and the parties' submissions are sufficient to state a valid claim for failure to comply with the federal statute. *See* *Jenkins, supra*, 634 N.E.2d at 1004-05 (noting that expert's affidavit alleging that label failed to comply with FHSA stated valid claim based on violation of the Act).

IV

Against this setting, the issue is whether the warning labels on defendants' Lacquer Seal product complied with the labeling requirements of the FHSA. The requirements are contained within the statute and its regulations, which provide a loose framework of instructions applicable [***27] to all products that are "hazardous substances" within the meaning of FHSA. *See generally* 15 *U.S.C.A.* § 1261(p)(1) (phrasing similar at 16 *C.F.R.* § 1500.3(b)(14)). Unlike other types of labeling statutes, the FHSA and its regulations do not dictate the specific warning language which must be contained in the warning labels. Instead, the statute and its regulations provide that a hazardous substance will be considered "misbranded" (and therefore noncompliant) when its label fails to include certain basic information about the product, its contents, and its proper use. *See generally* 15 *U.S.C.A.* § 1261(p)(1) (phrasing similar at 16 *C.F.R.* § 1500.3(b)(14)).

[*87] The statute provides, in pertinent part, that warning labels must include:

> "(A) the name and place of business of the manufacturer, packer, distributor or seller;
>
> (B) the common or usual name or the chemical name (if there be no common or usual name) of the hazardous substance or of each component which contributes substantially to its hazard, unless the Commission by regulation permits or requires the use of a recognized generic name;
>
> (C) the signal word "DANGER" on substances which are [***28] extremely flammable, corrosive, or highly toxic;
>
> (D) the signal word "WARNING" or "CAUTION" on all other hazardous substances;
>
> (E) an affirmative statement of the principal hazard or hazards, such as "Flammable", "Combustible", "Vapor Harmful", "Causes Burns", "Absorbed Through Skin", or similar wording descriptive of the hazard;
>
> (F) precautionary measures describing the action to be followed or avoided, except when modified by regulation of the Commission pursuant to section 1262 of this title. . . ."
>
> [15 *U.S.C.A.* § 1261(p)(1) (phrasing similar at 16 *C.F.R.* § 1500.3(b)(14)(i)).]

In addition, the regulations also set forth requirements regarding the placement and conspicuousness of the warning labels. *See generally* 15 *U.S.C.A.* § 1261(p)(2) (phrasing similar at 16 *C.F.R.* § 1500.3(b)(14)(ii)); 16 *C.F.R.* § 1500.121.

[**1376] Plaintiffs' expert states in his affidavit that the Lacquer Seal warning label fails to meet the requirements of 15 *U.S.C.A.* § 1261(p)(1)(E) and (F), in a number of ways:

> (1) There is no information about the danger of Lacquer Seal vapors on the front panel of the package. The statements "[v]apor is heavier than [***29] air" and "[v]apor may travel to other than work area" which are contained on the side panel label do not warn users that the vapors can travel to distant ignition sources and then flash back to the work area.
>
> (2) The face panel suggests that the only danger associated with the Lacquer Seal vapors is a health hazard. The precautionary instruction "[u]se with adequate ventilation" appears in a box containing information about the danger of concentrating and inhaling Lacquer Seal fumes.
>
> (3) The precautionary instruction "[u]se with adequate ventilation" is insufficient. The instruction should direct users to employ floor level ventilation, which would be more effective in dispersing vapors and decreasing the possibility of a flash fire.
>
> (4) The label insufficiently defines "adequate ventilation" as the "positive movement of air and fresh air supplied through open windows and doors." The [*88] definition should instead read "positive movement of air by spark-proof mechanically assisted means and fresh air through open windows and doors."

In addition to the substantive violations, plaintiffs' affidavit also states that the defendants' label fails to meet many of the requirements [***30] for language placement and prominence contained at 16 *C.F.R.* § 1500.121-.135.

Plaintiffs contend that the issue of compliance with the FHSA is a question of fact, which is properly resolved by only a jury. They further maintain that, because the parties have submitted opposing expert reports which dispute whether the label complies with the FHSA, there is a factual dispute which precludes summary judgment. *See* *Jenkins, supra*, 634 N.E.2d at 1004-05 (summary judgment for defendants precluded where issue of fact existed as to whether paint stripper product label complied with FHSA).

Defendants respond that even though the FHSA does not require specific warning language, the issue of compliance does not require a jury decision. An analysis of the Lacquer Seal warning label by this court, they contend, is comparable to other situations where courts have ruled on the sufficiency of a warning label or disclosure statement as a matter of law. *See, e.g.*, *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 369 (3d Cir.1993) (summary judgment granted where allegedly false statements in prospectus were found to be "immaterial" as a matter of law), *cert. denied,* 510 U.S. [***31] 1178, 114 S. Ct. 1219, 127 L. Ed. 2d 565 (1994); *Meyer v. International Playtex, Inc.*, 724 F. Supp. 288, 293-94 (D.N.J.1988) (summary judgment granted after finding that a manufacturer's label complied with the requirements of the Medical Devices Amendment Act as a matter of law); *see also* *Moss, supra*, 985 F.2d at 742 (label complied with FHSA as a matter of law).

My examination of defendants' Lacquer Seal label convinces me that it clearly satisfies the labeling requirements of the FHSA, and therefore there is no material issue of fact as to compliance. As previously stated, the front panel of defendants' one gallon can states in clear bold lettering as follows:

[*89] *DANGER!*

EXTREMELY FLAMMABLE

VAPORS MAY CAUSE FLASH FIRE

Read Carefully Other Cautions on Back and Side Panels

This same cautionary language appears in white lettering on a red background on the back of the can. A second label on the back [**1377] contains a 1 1/2 inch by 2 inch flame symbol over the phrase FLAMMABLE LIQUID. The right side panel contains the symbol of a fire extinguisher, a no smoking sign, and the following warnings:

> UNUSUAL FIRE AND EXPLOSION HAZARDS: NEVER USE WELDING OR CUTTING [***32] TORCH NEAR CONTAINERS, EVEN EMPTY. THIS MATERIAL MAY BURN WITH A FLAME WHICH IS INVISIBLE IN DAYLIGHT.

VAPOR HARMFUL

PREVENT BUILD-UP OF VAPORS

VAPORS MAY IGNITE EXPLOSIVELY

VAPOR IS HEAVIER THAN AIR

VAPORS MAY TRAVEL TO OTHER THAN WORK AREA

The warnings stated on these labels clearly satisfy the requirements of section 1261(p)(1)(C) and (E) of the regulations, which merely require that warning labels include the words "DANGER" and "FLAMMABLE" "or similar wording descriptive of the hazard." As to the precautionary measures to be followed or taken prior to the product's use, under section 1261(p)(1)(F), defendants' label states in the front panel:

> EXTINGUISH ALL FLAMES AND TURN OFF ALL GAS PILOT LIGHTS (in furnaces, hot water heaters, stoves, dryers, etc.) IN WORKING AREA, ADJOINING ROOMS, AND LOWER AND UPPER AREAS. Keep containers and content away from heat sparks, and open flame. SHUT OFF ELECTRIC MOTORS, HEATERS, STOVES AND OTHER SOURCES OF IGNITION DURING USE AND UNTIL ALL VAPORS ARE GONE. DO NOT TURN ON OR OFF ANY LIGHT SWITCHES OR PLUG IN OR UNPLUG ANY ELECTRICAL APPLIANCES. DO NOT SMOKE. Post danger warnings and close off [*90] access to working areas during application [***33] and until all vapors are gone. USE ONLY WITH ADEQUATE VENTILATION (positive movement of air and fresh air supplied through open windows and doors during application and until the coating is completely dry.)

These statements, setting forth the action to be taken prior to using the product are then repeated on the back panel. The left side panel contains data relating to Lacquer Seal's health, fire and explosion hazards, and information pertaining to the product's safe handling and use.

Altogether, the warnings and precautions stated on all four sides of defendants' product more than adequately satisfy the requirements of section 1261(p)(1). Moreover, by providing a warning that vapors may travel to other areas and ignite into a flash fire, defendants' product addresses the very risk that caused plaintiffs' injuries and that concerned the FHSA. *See* Busch, supra, 214 Ill.Dec. at 840, 662 N.E.2d at 406.

Plaintiffs' contentions that defendants' product did not provide enough information on the flammable nature of vapors or the preparations needed for proper ventilation are rejected. Disagreement over the adequacy or sufficiency of the information provided on a label does not necessarily raise material [***34] issues of fact as to compliance. What matters is whether the label satisfies the requirements of the FHSA, not whether a label defines every phrase and addresses every potential hazard.

The legislative history of the FHSA clearly establishes that cautionary labeling is intended for the ordinary consumer of household products. Warnings and instructions should be easy to understand and to follow by the household user so as not to frustrate the very purpose of the statute. When discussing volatile substances which tend to create flash fires and accidental deaths when used near a pilot light, a circumstance similar to that which confronted the Cantys, the House Committee on Interstate and Foreign Commerce made the following observation:

> [E]ven if it were possible to devise directions which, if complied with to the letter, would prevent an explosion -- such as a direction not to have a pilot light [**1378] going in the basement, not to light a match in basement, and to prevent the generation of a [*91] spark in the basement such as might occur from the discharge of static electricity or a spark from walking across the basement floor -- it would obviously be unreasonable to expect compliance with such [***35] stringent directions by the ordinary user. Moreover, children and others who have not seen the label directions, including strangers such as meter readers, might enter the basement without being aware of the danger, and cause a spark.
>
> Again, there might be offered for household use a hazardous substance which only a skilled operator could be expected to use competently and safely, and the necessary instructions for the safe use of which could not be expected to be understood and followed by the householder. Obviously, therefore, [certain phrases] would tend to frustrate the purpose of the bill as applied to such substances.
>
> [House Comm. on Interstate and Foreign Commerce, Child Protection Act of 1966, H.R.Rep. No. 2166, 89th Cong., 2d Sess. 3 (1966), *reprinted in* 1966 *U.S.C.C.A.N.* 4095, 4103.]

The Consumer Product Safety Commission (CPSC), the agency which oversees enforcement of the FHSA, does not require formal approval of a label before a hazardous product may be introduced into commerce. The CPSC, however, has provided sample warning labels for certain products. *See, e.g.,* 16 *C.F.R.* § 1500.130 (acceptable warning label for ethylene glycol based [***36] radiator antifreeze); *see also* Busch, supra, 662 N.E.2d at 408 (court reviewed suggested label for paint strippers containing methylene chloride). While sample cautionary language is not specifically provided for lacquer, the CPSA has published a sample warning for certain "contact adhesives" which have a similar flash fire propensity as lacquer. The example, found at 16 *C.F.R.* § 1500.133(b) (1994), provides the following warnings:

> DANGER
>
> EXTREMELY FLAMMABLE
>
> VAPORS MAY CAUSE FLASH FIRE
>
> Vapors may ignite explosively. Prevent buildup of vapors--open all windows and doors--use only with cross-ventilation. Keep away from heat, sparks, and open flame.
>
> Do not smoke, extinguish all flames and pilot lights, and turn off stoves, heaters, electric motors, and other sources of ignition during use and until all vapors are gone. Close container after use. Keep out of the reach of children.
>
> [*Ibid.*]

[*92] According to the CPSC, this warning statement is "the minimum cautionary labeling adequate to meet the requirements of section 2(p)(1) of the act."

Ibid. The language proposed by the CPSC is virtually identical to that contained on defendant's label and addresses [***37] the same risk, the igniting of vapors which are not properly ventilated. Paragraph (c) of that section sets forth instructions for the organization and size of type:

> The words that are in capital letters in the warning statement set forth in paragraph (b) of this section should be printed on the main (front) panel or panels of the container in capital letters of the type size specified in § 1500.121(c). The balance of the cautionary information may appear together on another panel provided the front panel bears a statement such as "Read carefully other cautions on ___ panel," the blank being filled in with the identification of the specific label panel bearing the balance of the cautionary labeling. It is recommended that a borderline be used in conjunction with the cautionary labeling.
>
> [16 *C.F.R.* § 1500.131(c).]

The organization of the cautionary language instructions found on defendant's product label follows the recommendations of paragraph (c).

Because defendant's label complies with the CPSC's recommended language, format and type size, and because the label and the sample warning contained at 16 *C.F.R.* § 1500.133, are so similar, I find that defendants [***38] are in compliance with the requirements of 15 *U.S.C.A.* § 1261(p)(1) and (p)(2). Indeed, the label on defendant's Lacquer [**1379] Seal can appears to be one large warning and cautionary statement with clearly written cautionary language and commonly used symbols on all four sides of the product. I am mindful of plaintiffs' contention that defendant's label did not present information in the correct type face or type size and that the label "presents a cluttered and jumbled array of warnings in a poorly organized fashion." These contentions are also rejected, because I find that defendant's product was properly labeled in accordance with the applicable federal standards. *See* 16 *C.F.R.* § 1500.121. I further note that all the information on the label was read by Samuel Canty to his father, Joseph, before they used the product. [*93]

Under the summary judgment standard recently set forth in *Brill v. Guardian Life Ins. Co.,* 142 N.J. 520, 523-24, 666 A.2d 146 (1995), a genuine issue of material fact exists if upon an examination of the competent evidential materials supplied, in a light most favorable to the nonmoving party, a rational jury could find for the nonmovant. Applying [***39] this standard to the evidence presented in this case, I find that no rational jury would conclude that the Lacquer Seal label failed to comply with the requirements of the FHSA, particularly in light of the sample warning provided by the CPSC. Hence, there are no material issues of fact in dispute, and defendants' motion to dismiss plaintiffs' complaint is granted.

LEXSEE

CERDANT, INC., and THE LAPTOP GUY, INC., individually and on behalf of all others similarly-situated, Plaintiffs, v. DHL EXPRESS (USA), INC., Defendant.

Case No. 2:08-cv-186

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

2009 U.S. Dist. LEXIS 27070

March 30, 2009, Decided
March 30, 2009, Filed

PRIOR HISTORY: Cerdant, Inc. v. DHL Express (USA), Inc., 2009 U.S. Dist. LEXIS 26058 (S.D. Ohio, Mar. 16, 2009)

COUNSEL: [*1] For Cerdant, Inc., on behalf of itself and all others similarly-situated, Plaintiff: Joseph F Murray, LEAD ATTORNEY, Brian K Murphy, Murray Murphy Moul & Basil - 2, Columbus, OH.

For DHL Express (USA) Inc., and its predecessors in interest, Defendant: Anthony C White, LEAD ATTORNEY, O Judson Scheaf, III, Thompson Hine LLP, Columbus, OH.

JUDGES: ALGENON L. MARBLEY, UNITED STATES DISTRICT JUDGE.

OPINION BY: ALGENON L. MARBLEY

OPINION

AMENDED OPINION & ORDER

[1]

1 In Section IV, subsection A, the subsection heading and language underneath the heading refer to the "Federal Aviation Administration Arbitration Act." The original Opinion and Order has been amended to reflect the correct title of the Act, which is the "Federal Aviation Administration Authorization Act."

I. INTRODUCTION

Plaintiffs Cerdant, Inc. ("Cerdant") and The Laptop Guy, Inc. ("Laptop Guy") bring this class action, on behalf of themselves and all others similarly situated, against Defendant DHL Express (USA), Inc. ("DHL"). Plaintiffs' claims stem from their use of DHL's web services and include: breach of contract claims; a breach of the obligation of good faith, fair dealing, and commercial reasonableness claim; an unjust enrichment and imposition of a constructive [*2] trust claim; a promissory estoppel claim; a claim for money had and received; and a claim for declaratory and injunctive relief. DHL now moves to dismiss all of the non-contract claims asserted against it pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth below, the motion is **GRANTED**.

II. BACKGROUND

A. Factual Background

These facts are taken from the Complaint. Over a period of several years, Cerdant and Laptop Guy utilized DHL's website to generate waybills for letters or packages they planned on shipping, or planned to have their customers ship, through DHL. Plaintiffs assert that DHL assesses shipping fees to customer accounts as soon as these waybills are printed, despite the fact that customers may not decide to follow through with a shipment or may print several copies of a waybill. Plaintiffs allege that on several occasions they have decided not to follow through with a shipment for which they had generated a waybill. They further allege that they have been charged shipping fees despite not tendering the items listed in such waybills to DHL for delivery.

In order to use DHL's services through the Internet, customers are required to register and set [*3] up an online account. While going through the process of setting up an account on DHL's website, customers are required to check a box stating that they agree to be bound by DHL's online Terms and Conditions. The Terms and Conditions set forth the agreement between DHL and its customers for services provided by DHL. DHL's Terms and Conditions also make reference to other service guidelines, and the webpage also contains a link to DHL's shipment rules and regulations.

Plaintiffs allege that none of these documents makes reference to the ability or authority of DHL to charge customers for goods that are never tendered for delivery. Furthermore, Plaintiffs note that none of the documents states that customers will be charged for printing waybills, regardless of whether they follow through with a shipment. Despite these omissions, Plaintiffs assert that they, as well as other members of the class, have been charged shipping fees for goods that have never been tendered to DHL for delivery. Thus, they allege that DHL has breached the terms of its standardized agreement with its customers.

B. Procedural History

On August 16, 2007, Cerdant filed a class action complaint in the Court of Common [*4] Pleas for Franklin County, Ohio. On February 1, 2008, Cerdant filed a Motion for Leave to File First Amended Complaint seeking to add Laptop Guy as an additional plaintiff and class representative. The case was then removed to this Court on the basis of diversity jurisdiction. DHL responded to the Complaint with a Rule 12(b)(6) Motion to Dismiss which is now before the Court.

III. STANDARD OF REVIEW

A case may be dismissed if the complaint does not state a claim on which relief can be granted. Fed. R. Civ. P. 12(b)(6). A "motion to dismiss for failure to state a claim is a test of the plaintiff's cause of action as stated in the complaint, not a challenge to the plaintiff's factual allegations." *Golden v. City of Columbus*, 404 F.3d 950, 958-59 (6th Cir. 2005). Consequently, the Court must construe the complaint in the light most favorable to the non-moving party, accept all factual allegations as true, and make reasonable inferences in favor of the non-moving party. *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008); *Murphy v. Sofamor Danek Group, Inc.*, 123 F.3d 394, 400 (6th Cir. 1997). A court will grant a motion to dismiss under [*5] Rule 12(b)(6) only if there is an absence of law to support a claim of the type made or of facts sufficient to make a valid claim, or if on the face of the complaint there is an insurmountable bar to relief indicating that the plaintiff does not have a claim. *Cmty. Mental Health Servs. v. Mental Health & Recovery Bd.*, 395 F. Supp. 2d 644, 649 (S.D. Ohio 2004).

Although liberal, this standard requires more than the bare assertion of legal conclusions. *Allard v. Weitzman*, 991 F.2d 1236, 1240 (6th Cir. 1993). Under the federal pleading requirements, a plaintiff's complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." *See* Fed. R. Civ. P. 8(a)(2). The complaint must "give the defendant fair notice of what the claim is, and the grounds upon which it rests." *Nader v. Blackwell*, 545 F.3d 459, 470 (6th Cir. 2008) (quoting *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007) (internal quotations omitted)). While a complaint need not contain "detailed factual allegations," its "factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are [*6] true." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007).

IV. LAW AND ANALYSIS

A. Plaintiffs' Non-Contract Claims are Preempted by the Federal Aviation Administration Authorization Act

Counts II-VI of Plaintiffs' complaint set forth various claims including: a claim for breach of the obligation of good faith, fair dealing, and commercial reasonableness; a claim for unjust enrichment and imposition of a constructive trust; a promissory estoppel claim; a claim for money had and received; and a claim for declaratory and injunctive relief (collectively, the "noncontract claims"). DHL's principal ground for dismissal is that the non-contract claims set forth in the Complaint fail to state a claim upon which relief can be granted because they are preempted as a matter of law by the Federal Aviation Administration Authorization Act (FAAAA) § 14501(c)(1) and § 41713(b)(4). DHL notes that the FAAAA employs the same expansive language as the Airline Deregulation Act (ADA) [2]; therefore, DHL argues that the FAAAA has the same broad preemptive scope as the ADA.

2 The ADA's preemption provision provides, "[N]o State . . . shall enact or enforce any law, rule, regulation, standard, [*7] or other provision having the force and effect of law relating to rates, routes, or services of any air carrier . . ." 49 U.S.C.App. § 1305(a)(1) (1978).

Plaintiffs retort that DHL has failed to establish that it is a motor carrier under the FAAAA for purposes of the transactions set forth in the Complaint. They argue that the transactions fall outside the scope of activity preempted by the statute because DHL never engaged in transporting goods in interstate commerce. Furthermore, Plaintiffs argue that the FAAAA does not apply in this case because the express language of FAAAA § 14705 requires delivery or tender of delivery for a claim to fall under the scope of the FAAAA. [3]

3 The Plaintiffs also make a brief statement asserting that DHL has waived its right to assert preemption as a basis for dismissal because it failed to raise preemption as an affirmative defense in its responsive pleading. Plaintiffs, however, provide no legal support for this argument. In any event, the case law makes clear that failure to raise an affirmative defense does not always result in a waiver. The purpose of the waiver rule is give notice to the opposing party and to give that party a chance to respond. [*8] *See* *Smith v. Sushka*, 117 F.3d 965, 969 (6th Cir. 1997). If the failure to assert an affirmative defense does not result in surprise or unfair prejudice to the opponent, the failure will not be fatal. *Id.*; *Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d 1439, 1445 (6th Cir. 1993); *Stupak-Thrall v. Glickman*, 346 F.3d 579, 585 (6th Cir. 2003). After Cerdant filed their Complaint in state court, DHL filed a Motion for Summary Judgment and asserted preemption as a basis for its motion. Thus, Plaintiffs in this case have not been subject to surprise or unfair prejudice as a result of DHL's failure to raise preemption as an affirmative defense.

The FAAAA preemption provision provides, "[A] state . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law *related to* a price, route, or service of any motor carrier . . ." 49 U.S.C. § 14501(c)(1) (1994) (emphasis added). [4] This language is identical to the preemption provision of the ADA; therefore, the FAAAA's preemption provision is to be broad in scope and preclude "any state enforcement action having a connection with or reference to any price, route, or service of any motor carrier, motor private [*9] carrier, or air carrier." *Deerskin Trading Post, Inc. v. United Parcel Serv. of Am.*, 972 F. Supp. 665, 669 (N.D. Ga. 1997); *Barber Auto Sales, Inc. v. United Parcel Servs., Inc.*, 494 F. Supp. 2d 1290, 1293 (N.D. Ala. 2007). Furthermore, the House Conference Report on the FAAAA explains that its preemption provision "is identical to the preemption provision deregulating air carriers . . . and is intended to function in the exact same manner with respect to its preemptive effects." *Deerskin*, 972 F. Supp. At 669 (quoting H.R. Conf. Rep. No. 103-677, 103rd Cong., 2d Sess. 85 (1994), *reprinted in* U.S.C.A.N.N. 1715, 1757); *see* *Ace Auto Body & Towing, Ltd. v. City of New York*, 171 F.3d 765, 773 (2d Cir. 1999); *see also* *Mastercraft Interiors, Ltd. v. ABF Freight Shippers, Inc.*, 284 F. Supp. 2d 284, 286 (D. Md. 2003) (stating that Congress intended for the preemption provision of the FAAAA to be applied in the same manner as the preemption provision in the ADA).

4 Section 41713(b) contains similar language, stating "[A] state . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier . . ." 49 U.S.C. § 41713(b).

Thus, [*10] in applying the preemption provision of the FAAAA, this Court will rely on the Supreme Court's interpretation of the scope of the ADA's preemption provision. The Supreme Court has focused on the words "relating to" when interpreting the ADA preemption provision, and concluded that such language has an expansive sweep. *See* *Morales v. Trans World Airlines*, 504 U.S. 374, 384-85, 112 S. Ct. 2031, 119 L. Ed. 2d 157 (1992) (stating that the ADA preemption provision is not limited to state action actually prescribing rates, routes or services; rather, it applies to any state enforcement actions "having a *connection with or reference to* airline rates, routes or services..." (emphasis added)). The ordinary meaning of "relating to" is broad: "to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with . . ." *In re EVIC Class Action Litigation*, No. M-21-84, 2002 U.S. Dist. LEXIS 14049, 2002 WL 1766554, at *8 (S.D.N.Y. July 31, 2002), *citing see* *Deerskin Trading*, 972 F.Supp. at 668. The claims asserted in *Deerskin* were held to "relate to" the prices charged by the defendants for various services because the core of each claim was that the defendant inappropriately charged the plaintiff. *Deerskin*, 972 F. Supp. at 672.

The [*11] Supreme Court has also held that while the ADA does not bar routine breach of contract claims, courts are limited to "the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 233, 115 S. Ct. 817, 130 L. Ed. 2d 715 (1995). Based on this principle, other federal courts have held that the FAAAA preempts equitable claims because such claims represent a departure from "routine breach of contract actions" and an "enlargement and enhancement" of the parties' bargain. *See* *Deerskin*, 972 F. Supp at 673 (dismissing claims for unjust enrichment, imposition of a constructive trust, and injunctive relief because such an award would be "extraordinary" and outside the scope of "routine breach of contract actions"); *see also, e.g.,* *Barber Auto Sales*, 494 F. Supp. 2d at

1294 (dismissing equitable claims for injunctive relief and rescission of the contract because such claims are preempted by the FAAAA); *Yellow Transp., Inc. v. DM Transp. Mgmt. Servs., Inc.*, No. 06DCV1517-LDD, 2006 U.S. Dist. LEXIS 51231, 2006 WL 2871745, at *4 (E.D. Pa. July 14, 2006) (dismissing claims for unjust enrichment, quantum meruit, and fraud because such claims are preempted by the FAAAA, [*12] but breach of contract claim survives); *Thermal Techs., Inc. v. United Parcel Serv., Inc.*, No. 08-CV-102-GKF-FHM, 2008 U.S. Dist. LEXIS 90243, 2008 WL 4838681, at *9 (N.D. Okla. Nov. 5, 2008) (dismissing unjust enrichment claim because it is preempted by the FAAA); *All World Prof'l Travel Servs., Inc. v. Am. Airlines, Inc.*, 282 F.Supp.2d 1161, 1169 (C.D. Cal. 2003) (finding that claims for unjust enrichment and declaratory and injunctive relief are preempted if the claims relate to prices or services).

The reasoning employed by the courts set forth above demonstrates that the Plaintiffs' claims for equitable relief in this case must be dismissed as a matter of law because they are preempted by the FAAAA. The claims asserted by the Plaintiffs "relate to" the price that DHL is charging its customers when they generate waybills online because, similar to the claims in *Deerskin*, at the core of the claims is the argument that DHL inappropriately charged the Plaintiffs. The claims also have a "connection" to the Internet services provided by DHL on its website. Just as the claims in *Deerskin* and *Barber Auto Sales*, however, the non-contract claims set forth in the Complaint go beyond a "routine breach of contract" claim. [*13] All of these claims would constitute an enlargement or enhancement of the parties' bargain, and granting such relief "cannot be said to be routine, especially as a remedy for a breach of contract." *Barber Auto Sales*, 494 F. Supp. 2d at 1294 (quoting *Deerskin*, 972 F. Supp at 674-75).

The Plaintiffs attempt to refute DHL's preemption argument by asserting that DHL has failed to demonstrate that it qualifies as a motor carrier under the FAAAA with respect to the transactions at issue. They argue that DHL fails to meet the definition of a motor carrier in this case because DHL has not provided "motor vehicle transportation for compensation" since no goods were ever tendered for delivery. *See* 49 U.S.C. § 13102(14) (defining motor carrier). However, § 41713(b)(4), *Preemption: Transportation by air carrier or carrier affiliated with a direct air carrier*, states:

> [A] State . . . may not enact or enforce a law, regulation, or other provisions having the force and effect of law related to a price, route, or service of an air carrier . . . when such carrier is transporting property by aircraft or by motor vehicle (*whether or not such property has had or will have a prior or subsequent movement*).

49 U.S.C. § 41713(b)(4) [*14] (emphasis added). Accordingly, it is clear that DHL would qualify as a motor carrier under the FAAAA for the purposes of the transactions at issue. The sole basis for customers printing waybills online is to utilize the services of DHL to transport property. The fact that customers decide not to execute a waybill has no bearing on the effect of the statute because § 41713(b)(4) specifically states that it applies to goods regardless of whether they have "had or will have a prior or subsequent movement." Furthermore, the sole purpose behind the business relationship of the parties is to engage in the transportation of goods. [5]

> 5 Plaintiff also points to a California case which held that the plaintiff's state law claims were not preempted under the FAAAA. *See Wayne v. DHL Express (USA), Inc.*, No. B171591 2005 WL 1140686 (Cal. Ct. App. May 16, 2005). This case is distinguishable from the case at hand because it involved claims that DHL did not have a license to sell insurance and that its insurance rates were excessive. Unlike the case at hand, these were optional services DHL was providing to its customers, and the claims asserted were not equitable claims.

Another argument advanced by [*15] Plaintiffs is that DHL's preemption claim is precluded under FAAAA § 14705 because a claim for overcharges under that section only accrues "on delivery or tender of delivery by the carrier." 49 U.S.C. § 14705(g). Plaintiffs argue that since no goods in this case were ever delivered or tendered for delivery, the FAAAA has no application in this case. However, § 14705 addresses limitations on civil actions against a carrier to recover overcharges. An action to recover overcharges is a breach of contract claim, and DHL has excluded those claims from its Motion to Dismiss, and is seeking to dismiss only the noncontract claims. Section 14705 has been construed by courts as only applying to breach of contract claims, and has no impact on the FAAAA's preemption of non-contract claims. *See Lear Corp. v. LH Trucking, Inc.*, No. 05-74477, 2008 U.S. Dist. LEXIS 50548, 2008 WL 2610239, at *10 (E.D. Mich. July 1, 2008) (holding that the term "overcharge" in § 14705(b) applied to plaintiff's breach of contract claim because the meaning of the term is to "charge too much or too fully" based on a stated contractual amount); *see also Barber Auto Sales*, 494 F. Supp. 2d at 1294-95 (applying § 14705(b) solely to the plaintiff's breach [*16] of contract claim, and not to the plaintiff's equitable claims). Therefore, § 14705 does not bar DHL's preemption claim for Plaintiffs' non-contract claims.

For the reasons set forth herein, Plaintiffs' non-contract claims are dismissed as a matter of law because they are preempted by FAAAA § 14501(c)(1) and § 41713(b)(4).

B. Plaintiffs' Equitable Claims Cannot Stand In Face of Breach of Contract Claims

DHL also asserts an alternative basis for the dismissal of Plaintiffs' claims for unjust enrichment and imposition of a constructive trust, promissory estoppel, and money had and received. DHL argues that these claims must be dismissed as a matter of law because they cannot exist in the face of a breach of contract action. Plaintiffs make no attempt to refute this assertion in their memorandum in opposition.

A plaintiff is entitled to equitable relief only when there is no adequate legal remedy available. *Di Giovanni v. Camden Fire Ins. Ass'n*, 296 U.S. 64, 69, 56 S. Ct. 1, 80 L. Ed. 47 (1935); *see also Aluminum Workers Int'l Union v. Consol. Aluminum*, 696 F.2d 437, 446 (6th Cir. 1982) ("because equitable relief is an extraordinary remedy to be cautiously granted, it follows that the scope of relief should be strictly [*17] tailored to accomplish only that which the situation specifically requires and which cannot be attained through legal remedy.") In addition, where an express contract covers the subject matter of an equitable claim, the equitable claim will fail as a matter of law. *See Randolph v. New England Mut. Life Ins. Co.*, 526 F.2d 1383, 1387 (6th Cir. 1975) (dismissing claims of unjust enrichment where an express contract covered the same contract); *Davis & Tatera, Inc. v. Gray-Syracuse Inc.*, 796 F. Supp. 1078, 1086 (S.D. Ohio 1992) (stating that the plaintiff could not prevail on its claim for unjust enrichment where the plaintiff's claims were governed by a contract); *Cook v. Home Depot USA, Inc.*, No. 2:06-cv-00571, 2007 U.S. Dist. LEXIS 15679, 2007 WL 710220, at *8 (S.D. Ohio Mar. 6, 2007) (dismissing claims for unjust enrichment and money had and received when both claims challenged the same conduct as a breach of contract claim).

In this case, Plaintiffs have an adequate legal remedy in their breach of contract action; therefore, equitable relief is not necessary to make the parties to the Complaint whole. In addition, the equitable claims are based on the same conduct as the breach of contract action. The breach of [*18] contract claim alleges that DHL has inappropriately charged its customers for goods never tendered to them for delivery. Similarly, the equitable claims rest on this alleged inappropriate conduct of DHL. There is also a contract governing the relationship between DHL and customers using the website, which is set forth in DHL's online Terms and Conditions and other shipping guidelines. Thus, as a matter of law, Plaintiffs' claims for equitable relief cannot stand.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendant DHL's Motion to Dismiss all non-contract claims pursuant to Federal Rule of Civil Procedure 12(b)(6).

IT IS SO ORDERED.

/s/ Algenon L. Marbley

ALGENON L. MARBLEY

UNITED STATES DISTRICT COURT

Dated: March 30, 2009